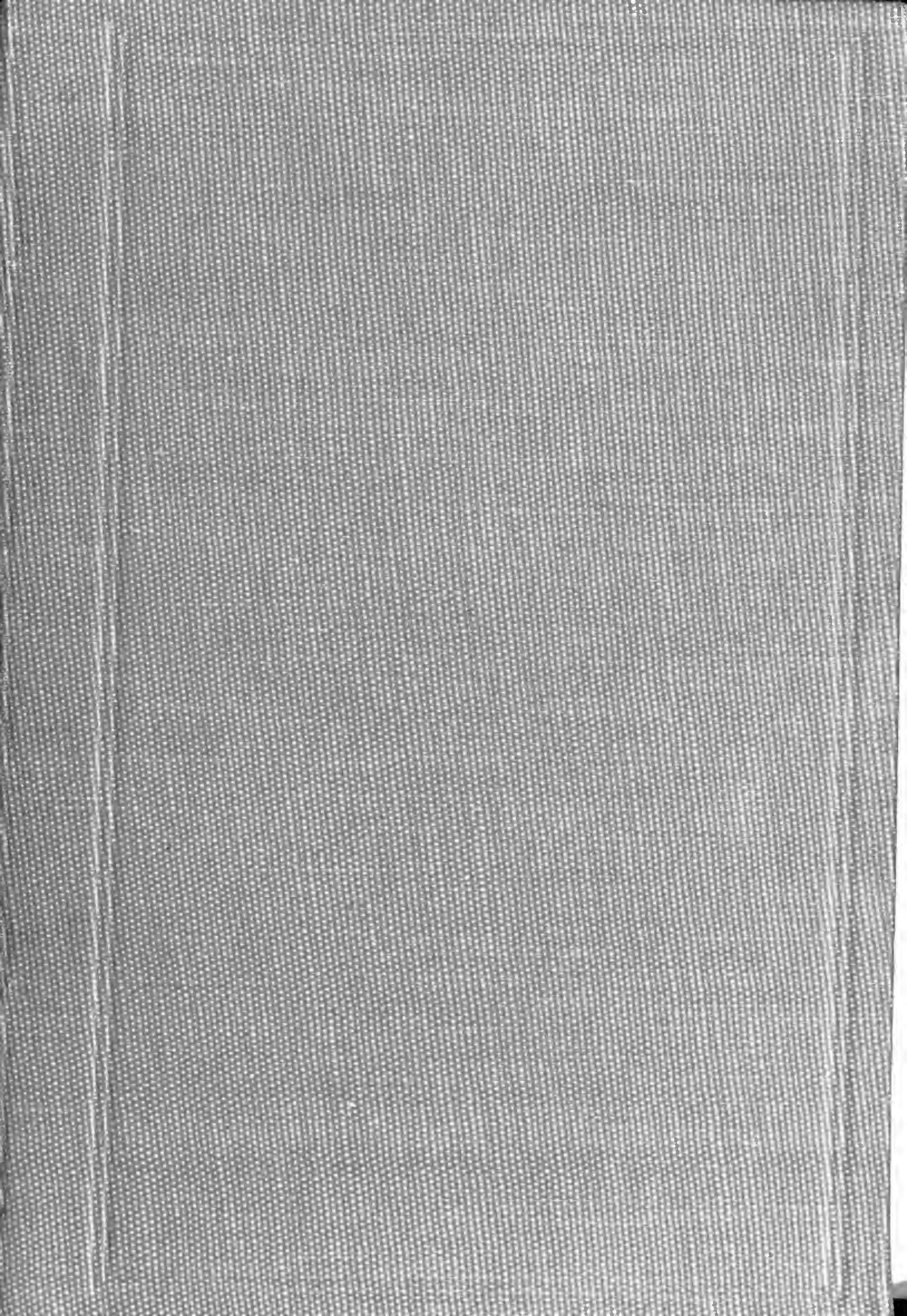

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1147

No. 3109

1147

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

FILED
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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,021.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and alleges:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of California and having its office and principal place of business in the city and county of San Francisco, State of California.

II.

That the defendant is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of New York and having an office and place of business in the city and county of San Francisco, State of California. That said defendant is a citizen of the State of New York.

III.

That on the 3d day of March, 1915, in a certain action then pending in the District Court of the

United States in and for the Northern District of California, Second Division, entitled The Equitable Trust Company of New York, as Trustee, Complainant, vs. Western Pacific Railway Company et al., Defendants, in Equity, No. 169, said court duly made and entered its order wherein and whereby Frank G. Drum and Warren Olney, Jr., were appointed the Receivers of the property of the said Western Pacific Railway [1*] Company; that thereafter and upon the 4th day of March, 1915, and in accordance with said order, the said Frank G. Drum and Warren Olney, Jr., duly and regularly qualified as such Receivers and thereupon the said Frank G. Drum and Warren Olney, Jr., became, and from the said 4th day of March, 1915, until the 14th day of July, 1916, continuously were, the duly appointed, qualified and acting Receivers of the property of the said Western Pacific Railway Company.

IV.

That, pursuant to a decree of foreclosure and sale made by said court in said cause upon the 27th day of May, 1916, and pursuant to a decree of confirmation of sale made and entered by said court on the 1st day of July, 1916, by deed of Francis Krull, Special Master, and of Frank G. Drum and Warren Olney, Jr., as Receivers, and others, dated the 1st day of July, 1916, all of the railways, franchises, rights and other property of the Western Pacific Railway Company, together with and including all accounts of every kind due to the Receivers of the said prop-

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*Page-number appearing at foot of page of original certified Transcript of Record.

erty of the said Western Pacific Railway Company, were granted, bargained, sold, assigned, transferred and conveyed to the plaintiff herein; that upon the 14th day of July, 1916, the plaintiff went into possession of all the said railways, franchises, rights and other property of the said Western Pacific Railway Company, including all accounts of every kind due to the said Receivers of the said property of the said Western Pacific Railway Company, and that the plaintiff is now the owner and in possession of all thereof.

V.

That during the month of November, 1915, there became due from the defendant to the said Frank G. Drum and Warren Olney, Jr., as Receivers of the property of the said Western Pacific Railway Company aforesaid, the sum of $7,341.46, money had and [2] received by the said defendant for the use and benefit of the said Frank G. Drum and Warren Olney, Jr., as such Receivers.

VI.

That the said defendant failed and refused, and ever since has failed and refused, to pay the said sum, or any part thereof, and that the same is now due, owing and unpaid from the said defendant to the said plaintiff herein.

WHEREFORE, plaintiff prays for judgment against the defendant for the sum of $7,341.46, with interest and costs of suit.

A. R. BALDWIN,
ALLAN P. MATTHEW,
Attorneys for plaintiff.

State of California,
City and County of San Francisco,—ss.

C. F. Craig, being first duly sworn, deposes and says: That he is the secretary of The Western Pacific Railroad Company, plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

C. F. CRAIG.

Subscribed and sworn to before me this 10th day of November, 1916.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 10, 1916. Walter B. Maling, Clerk. [3]

(Title of Court and Cause.)

Judgment.

This cause coming on regularly to be heard on this 27th day of August, 1917, on plaintiff's demurrer to the second amended answer and plaintiff's motion for judgment on the pleadings, and A. P. Matthew and A. R. Baldwin appearing as attorneys for plaintiff, and Knight and Heggerty and C. W. Durbrow appearing as attorneys for defendant, and

IT APPEARING to the satisfaction of the above-

entitled Court that the defendant in the above-entitled action, Pacific Mail Steamship Company, a corporation, heretofore duly made and gave its appearance in said action by serving and filing, on the 12th day of December, 1916, its answer to the verified complaint of plaintiff on file herein; that thereafter, on the 22d day of December, 1916, the plaintiff filed its demurrer to said answer on the ground that said answer did not state facts sufficient to constitute a defense or counterclaim and that on the 23d day of April, 1917, said demurrer duly and regularly came on to be heard and the same was argued by respective counsel for both parties before said Court and submitted and said Court thereupon duly made and gave its order sustaining said demurrer of the plaintiff, The Western Pacific Railroad Company, and granting the defendant twenty (20) days within which to file an amended answer; that thereafter, on the 6th day of June, 1917, the defendant served and filed its amended answer in said cause; that thereafter, on the 16th day of June, 1917, the plaintiff served and filed its general demurrer to said amended answer on the ground that said amended answer did not state facts sufficient to constitute a defense or counterclaim; that on said 16th day of June, 1917, plaintiff served and filed its motion for judgment on the pleadings on the ground that said amended answer did not state [4] facts sufficient to constitute a defense or counterclaim and that said amended answer was substantially the same in its allegations as the original answer on file herein; that thereafter, on the 9th day of July, 1917, said demur-

rer to the amended complaint and said motion for judgment on the pleadings duly and regularly came on to be heard, and thereupon counsel for defendant, Pacific Mail Steamship Company, in open court, confessed the demurrer to said amended answer; that thereupon the Court granted defendant twenty (20) days within which to file a second amended answer to the complaint on file herein; that thereafter, on the 3d day of August, 1917, the defendant served and filed its second amended answer to the complaint on file herein; that thereafter, on the 13th day of August, 1917, the plaintiff served and filed its general demurrer to said second amended answer on the ground that said second amended answer did not state facts sufficient to constitute a defense or counterclaim and served and filed its motion for a judgment on the pleadings on the ground that said second amended answer admitted that there was due, owing and unpaid from the defendant to the plaintiff the sum of $7,341.46 as prayed for in said complaint and that said second amended answer did not state facts sufficient to constitute a defense or counterclaim; that thereafter, on the 27th day of August, 1917, said demurrer and motion for judgment on the pleadings duly and regularly came on to be heard and that the same were argued by the respective counsel for both parties before said Court and duly submitted to the Court for consideration and decision; that thereupon, after due deliberation thereon, the Court duly made and gave its order wherein and whereby said Court sustained the said demurrer of the plaintiff to the said second amended answer of the defendant

without granting defendant leave to amend said second amended answer and granted the motion of plaintiff for judgment on the pleadings and ordered that judgment be entered in favor of plaintiff in [5] accordance with the prayer of the complaint.

NOW, THEREFORE, on motion of A. P. Matthew, Esquire, one of the attorneys for said plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff, The Western Pacific Railroad Company, a corporation, have and recover judgment against the defendant, Pacific Mail Steamship Company, a corporation, for the sum of $8,235.08 together with interest thereon at the rate of 7% per annum until paid, and costs of suit in the sum of $19.20.

Judgment entered August 27th, 1917.

WALTER B. MALING,
Clerk,
By J. A. Schaertzer,
Deputy Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk,
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed August 27, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 16,021.

THE WESTERN PACIFIC RAILROAD COMPANY,

Complainant,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled action was commenced by the filing of the complaint of plaintiff therein, in the office of the clerk of said Court and the issuance of a summons thereon by said clerk addressed to the defendant in form and substance as required by law, on the 10th day of November, 1916; that said Complaint with a copy of the Summons issued thereon attached thereto was duly served upon defendant.

1. December 12, 1916, defendant duly filed and served its answer to said complaint, duly verified; the following (omitting therefrom the title of court and cause and verification) is a true copy of said answer, viz:

Answer of Pacific Mail Steamship Company.

Now comes the above-named defendant, Pacific Mail Steamship Company, by Knight & Heggerty,

its attorneys, and for answer to the complaint in said action:

(1) Denies, that during the month of November, 1915, or at any other time, there became or was due from or payable to the said Frank G. Drum and Warren Olney, Jr., or either of them, as Receivers, or otherwise, or at all, the sum of $7,341.46, or any other sum or amount exceeding the sum of $5,233.08, for or as or of money had or received by the defendant, or for the use or benefit [7] of the said Frank G. Drum and Warren Olney, Jr., or either of them as such Receivers, or at all; or otherwise than and except as set out and stated herein in the separate answer of defendant.

(2) Alleges that in November, 1915, the defendant was and ever since has been and is now, willing and ready and in said month offered to pay to plaintiff the said sum of $5,233.08; and that the plaintiff then refused and ever since has refused and now does refuse to receive or accept said sum of $5,233.08, unless defendant would pay plaintiff the sum of $2,069.-25, which plaintiff then and ever since owed and was indebted to defendant and refused to and had not and has not paid.

FOR A SEPARATE ANSWER TO SAID COMPLAINT, AND AS AN OFFSET TO AND AGAINST THE DEMAND OF PLAINTIFF the defendant alleges:

1. That the defendant at all times stated in the Complaint and herein was a corporation duly created and existing under the laws of the State of New

York, and engaged in the foreign trade of the United States and in the business of transporting passengers and cargo upon the Pacific Ocean, between the ports of San Francisco, California, and Manila, Hong Kong, Shanghai, Kobe, and other ports in China and Japan; and that the plaintiff during all of said times was and now is a corporation duly created and acting under the laws of the State of California, and engaged in the business of carrying passengers and freight by railroad between San Francisco, California, and Salt Lake, Utah, and connecting with other interstate railroads through the United States.

2. Defendant avers upon information and belief, that at all times during the years 1911, 1912 and 1913, the plaintiff had prepared, published and filed and had on file in the office of and with the Interstate Commerce Commission, its printed "Terminal Tariff G. F. D. No. 35–B," and in the year 1914, up to September 1, 1915, its "Terminal Tariff G. F. D. No. 35–8," stating [8] and naming "Absorptions, –*–State Toll, –*– and other Terminal Charges, privileges, etc., at all points on line of Western Pacific Railway Company," wherein and whereby it did publish, provide and agree as follows: "Absorption of Terminal Charges on Import, Export and Coastwise Traffic at San Francisco, and Oakland (Western Pacific Mole), Cal.

"1. The rates as shown to and from San Francisco, Cal., in the Western Pacific Ry. Company's tariffs, or tariffs in which the Western Pacific Ry. Company, is shown as a participating carrier, and which are lawfully on file with the Interstate Com-

merce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from wharves served by those roads, respectively, on all traffic originating at, destined to or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden and Salt Lake City, Utah, and points east thereof.

The following absorptions will be made when this Company receives the line haul, viz.:

AT SAN FRANCISCO, CAL.: This Company will absorb switching charge of $2.50 per car for switching freight, carloads, *to or from wharves served by the Southern Pacific Company,* the Atchison, Topeka & Santa Fe Ry. (Coast Lines) and State Belt Railway; *also will absorb* State Toll. Loading and unloading charges will also be absorbed except on Lumber and its Products. (See Note.)

AT OAKLAND (WESTERN PACIFIC MOLE), CAL: This Company will absorb wharfage and handling charges on all freight except Lumber and its products and Empty Carriers returned. (See Note.)

2. On all competitive traffic, except as provided for in Paragraph No. 1, received from *or delivered to vessels at wharves of the Southern Pacific Company, Atchison, Topeka & Santa Fe Ry.* [9] *Co.* (Coast Lines) or State Belt Ry., at San Francisco, Cal., this

Company will absorb switching charge of $2.50 per car; *also will absorb* State Toll."

And effective September 1, 1915, its "Supplement No. 6, to Terminal Tariff G. F. D. No. 35–E," on the same subject, as follows:

"1. The rates as shown to and from San Francisco, Cal., in the Western Pacific Ry's tariffs, or tariffs in which the Western Pacific Ry. is shown as a participating carrier, and which are lawfully on file with the Interstate Commerce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from the wharves served by those roads, respectively, on all traffic originating at, destined to or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden, Salt Lake City, or Garfield, Utah, and points east thereof.

The following absorptions will be made when the Western Pacific Ry. receives the line haul, viz.:

At San Francisco, Cal.: The Western Pacific Ry. will absorb switching charge of $2.50 per car for switching freight, carloads, to or from wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. (Coast Lines) and State Belt Railway; also will absorb State Toll. Loading and unloading charges will also be absorbed except on Lumber and its Products. (See Note).

At Oakland (Western Pacific Mole), Cal.: The

Western Pacific Ry. will absorb wharfage and handling charges on all freight except Lumber and its Products and Empty Carriers returned. (See Note.)

2. On all competitive traffic, except as provided for in Paragraph No. 1, received from or delivered to vessels at [10] wharves of the Southern Pacific Company (Piers 42 and 44) or Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines) (Pier 54, at San Francisco, Cal., the Western Pacific Ry. will absorb switching charge of $2.50 per car; *also will absorb State Toll.*"

3. That during the years 1911. 1912, 1913, 1914 and 1915, the defendant received in the Orient, and carried across the Pacific Ocean and delivered to the plaintiff at San Francisco, California, import cargo routed over the line and road of plaintiff, 5,679 tons of cargo and 2,459 bales of wool, and the plaintiff delivered to and defendant received from plaintiff at the wharf and piers of defendant in San Francisco, California, 28,296 tons of export cargo and 22,241 bales of export wool, which defendant carried across the Pacific Ocean and delivered for the plaintiff; that the defendant paid the State Tolls for plaintiff on said import and export cargo of five cents per ton, amounting to $1,698.75, and on said import and export wool of one and one-half cents per bale, amounting to $370.50, a total of $2,069.25; and defendant also paid the freight for plaintiff on 30 packages carried by Defendant and delivered to plaintiff; making a total of $2,108.38, no part of which plaintiff had ever paid up to November, 1915.

4. That in November, 1915, the defendant collected the freight on and received at Manila for transportation on its steamship "Mongolia" across the Pacific Ocean and delivery to the plaintiff 1464 Drums of Cocoanut Oil destined from Manila to Chicago, and routed over the line and road of the plaintiff from San Francisco, California, and delivered the said oil to Plaintiff at San Francisco; the proportion of the freight thereon due the plaintiff and collected at Manila by defendant, was $7,341 46, being computed on 1,468,291 pounds at 50¢; and the defendant at the same time carried 30 cases of merchandise on and for which the plaintiff owned and was indebted to defendant in the sum of $39.13.

5. That defendant, in November, 1915, retained out of said $7,341.46, and applied and appropriated to the payment of the [11] said sum of $2,069.25 due and payable by plaintiff to defendant and no part of which plaintiff had up to that time ever paid to defendant for the said state tolls payable by plaintiff under its said tariffs and which State tolls had been as aforesaid paid by defendant to the State Board of Harbor Commissioners for the port of San Francisco, California, and also said freight charge of $39.13, a total of $2,108.38, and tendered and offered to pay to the plaintiff the balance and remainder of said $7,341.46, to wit: the sum of $5,-233.08; that plaintiff refused and ever since has refused to receive or accept payment from defendant of said balance and remainder of said $7,341.46, to wit: the said sum of $5,233.08; and that the defendant always has been and is now ready and willing

and hereby and now offers to pay to said plaintiff the said sum and balance of $5,233.08.

6. The defendant is ready and willing and able, and hereby offers and tenders payment to plaintiff of the said sum of $5,233.08, such payment to be made by defendant and received by plaintiff without prejudice in any way, manner or form, legal or equitable, to any and all of the legal and equitable rights of the plaintiff to assert and insist upon its claim in this action and to any and all of the legal rights of the defendant to assert and insist upon its claim in this action to offset against said $7,341.46 the said claim and demand of defendant to retain, apply and appropriate as it did, the said sum of $2,108.38 to the repayment to and reimbursement of defendant for the said sum of $2,069.25 for said State Tolls paid by Defendant and said $39.13 for said freight so carried as aforesaid by defendant; and to make its offer and tender good, defendant hereby offers to deposit with plaintiff said sum of $5,233.08, instead of in the Court, with the absolute right of the plaintiff to use and apply said $5,233.08 to its own use, as it shall see fit, and without any right or claim by defendant on or to said $5,233.08. [12]

7. That the said outward bound export freight delivered to defendant and inward-bound import freight delivered to plaintiff as aforesaid was delivered by plaintiff at and to defendant's vessels at piers 42 and 44, and the wharves of the Southern Pacific Company, Atchison, Topeka and Santa Fe Ry. Co. (Coast Lines) or State Belt Ry. at San Francisco, Cal., mentioned and stated in said Ter-

minal Tariffs G. F. D. No. 35–D, and G. F. D. No. 35–E, as aforesaid, include the said Piers 42 and 44, at and from which the vessels of defendant received said export cargo from plaintiff and delivered said import cargo to defendant; and that said State Tolls so paid by defendant were and are the State tolls which under said Terminal Tariffs were to be charged to, paid and absorbed by plaintiffs as and for a part and portion of and included in its legal, published scheduled rates and tariffs filed by plaintiff with the United States Interstate Commerce Commission.

WHEREFORE: Defendant prays the judgment of the Court that plaintiff take nothing by its complaint, that there be offset, awarded and adjudged to defendant the said sum of $2,108.38, as against and from the said claim and demand for $7,341.46 made in said complaint by plaintiff; and for such other and further relief, both general and special as shall be just and proper in the premises.

Dated December 11th, 1916.

KNIGHT & HEGGERTY,
Attorneys for Defendant.

2. December 22, 1916, plaintiff duly filed and served its demurrer to said answer; the following (omitting therefrom the title of court and cause, certificate of counsel thereto and admission of service) is a true copy of said demurrer, viz.: [13]

Demurrer to Answer.

Now comes the plaintiff above named and demurs to the answer on file herein and for cause of demurrer specifies:

I.

That said answer does not state facts sufficient to constitute a defense.

II.

That said answer does not state facts sufficient to constitute a counterclaim.

III.

That the first alleged defense in said answer contained does not state facts sufficient to constitute a defense.

IV.

That the first alleged defense in said answer contained does not state facts sufficient to constitute a counterclaim.

V.

That the second alleged defense in said answer contained does not state facts sufficient to constitute a defense.

VI.

That the second alleged defense in said answer contained does not state facts sufficient to constitute a counterclaim.

WHEREFORE, plaintiff prays judgment against defendant as prayed for in the complaint on file herein.

A. R. BALDWIN,
A. P. MATTHEW,
Attorneys for Plaintiff. [14]

3. Thereafter, after argument and due consideration by said Court, said demurrer was sustained, and defendant was granted leave to file an amended answer.

4. June 6, 1917, defendant duly filed and served its amended answer to said complaint, duly verified; the following (omitting therefrom the title of court and cause, verification and admission of service) is a true copy, viz.:

Amended Answer of Pacific Mail Steamship Company.

Now comes the above-named defendant, Pacific Mail Steamship Company, by Knight & Heggerty, its attorneys, and for its amended answer to the complaint in said action filed by leave of Court first had, defendant,

(1) Denies, that during the month of November, 1915, or at any other time, there became or was due from or payable to the said Frank G. Drum and Warren Olney, Jr., or either of them, as Receivers, or otherwise, or at all, the sum of $7,341.46, or any other sum or amount exceeding the sum of $5,233.08, for or as or of money had or received by the defendant, or for the use or benefit of the said Frank G. Drum and Warren Olney, Jr., or either of them as such Receivers, or at all; and defendant alleges that the facts are as set out and stated herein in the Separate Answer of Defendant.

(2) Alleges that in November, 1915, the defendant was and ever since has been and is now willing and ready and in said month offered to pay to plaintiff and tendered to plaintiff the said sum of $5,233.08; and that the plaintiff then refused and ever since has refused and now does refuse to receive or accept said sum of $5,233.08, unless defendant would pay plaintiff the sum of $2,069.25, which plaintiff

then and ever since owed and was indebted [15] to defendant and which sum the plaintiff refused to and has not *and has not* paid to defendant.

For a separate answer to said complaint, and as an offset to and against the demand of plaintiff, the defendant alleges:

1. That the defendant at all times stated in the complaint and herein was a corporation duly created and existing under the laws of the State of New York, and engaged in the foreign trade of the United States and in the business of transporting passengers and cargo upon the Pacific Ocean, between the ports of San Francisco, California, and Manila, Hong Kong, Shanghai, Kobe, and other ports in China and Japan; and that the plaintiff during all of said times was and now is a corporation duly created and acting under the laws of the State of California, and engaged in the business of carrying passengers and freight by railroad between San Francisco, California, and Salt Lake, Utah, and connecting with other interstate railroads through the United States.

2. Defendant avers upon information and belief, that at all times during the years 1911, 1912 and 1913, the plaintiff had prepared, adopted, published and filed and had on file in the office of and filed with the Interstate Commerce Commission, as required by the laws of the United States, its printed "Terminal Tariff G. F. D. No. 35–D," and in and during the year, 1914, up to September 1, 1915, its printed "Terminal Tariff G. F. D. No. 35–8," stating and naming "Absorptions,"—*—State Toll,—*—and other Ter-

minal Charges, privileges, etc., at all points on line of Western Pacific Railway Company," wherein and whereby it did publish, provide and agree as follows: "Absorption of Terminal Charges on Import, Export and Coastwise Traffic at San Francisco, and Oakland (Western Pacific Mole), Cal. **[16]**

"1. The rates as shown to and from San Francisco, Cal., in the Western Pacific Ry. Company's tariffs, or tariffs in which the Western Pacific Ry. Company is shown as a participating carrier, and which are lawfully on file with the Interstate Commerce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from wharves served by those roads, respectively, on all traffic originating at, destined to or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden and Salt Lake City, Utah, and points east thereof.

"The following absorptions will be made when this Company receives the line haul, viz.:

"At San Francisco, Cal. This Company will absorb switching charge of $2.50 per car for switching freight, carloads, *to or from wharves served by the Southern Pacific Company,* the Atchison, Topeka & Santa Fe Ry (Coast Lines) and State Belt Railway; *also will absorb* State Toll. Loading and unloading charges will also be absorbed except on Lum-

ber and its Products. (See Note).

"At Oakland (Western Pacific Mole), Cal.: This Company will absorb wharfage and handling charges on all freight except Lumber and its products and Empty Carriers returned. (See Note).

"2. On all competitive traffic, except as provided for in Paragraph No. 1, received from *or delivered to vessels at wharves of the Southern Pacific Company, Atchison, Topeka & Santa Fe Ry. Co.* (Coast Lines) or State Belt Ry., at San Francisco, Cal., this company will absorb switching charge of $2.50 per car; *also will absorb* State Toll."

And effective September 1, 1915, its printed "Supplement No. 6, to Terminal Tariff, G. F. D. No. 35–E," on [17] the same subject, as follows:

"1. The rates as shown to and from San Francisco, Cal., in the Western Pacific Rys. tariffs, or tariffs in which the Western Pacific Ry. is shown as a participating carrier, and which are lawfully on file with the Interstate Commerce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from the wharves served by those roads, respectively, on all traffic originating at, destined to or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden, Salt Lake City, or Garfield, Utah, and points east thereof.

"The following absorptions will be made when the Western Pacific Ry. receives the line haul, viz.:

"*At San Francisco, Cal.*: The Western Pacific Ry. will absorb switching charge of $2.50 per car for switching freight, carloads, to or from wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. (Coast Lines) and State Belt Railway; also will absorb State Toll. Loading and unloading charges will also be absorbed except on Lumber and its Products. (See Note.)

"*At Oakland (Western Pacific Mole), Cal.*: The Western Pacific Ry. will absorb wharfage and handling charges on all freight except Lumber and its Products and Empty Carriers returned. (See Note.)

"2. On all competitive traffic, except as provided for in Paragraph No. 1, received from or delivered to vessels at wharves of the Southern Pacific Company (Piers 42 and 44) or Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines) (Pier 54), at San Francisco, Cal., the Western Pacific Ry. will absorb switching charge of $2.50 per car; *also will absorb State Toll.*" [18]

3. Defendant alleges upon information and belief, that the plaintiff and defendant at and during all of said time had agreed upon a sum and amount which was to constitute and be the through total rate upon the cargo hereinafter referred to, and upon the amount of the apportionment of said total rate between the plaintiff and defendant, on all cargo received by defendant from the plaintiff at piers 42 and/or 44 to be carried by defendant to Oriental

points and on all cargo carried by defendant from Oriental pionts to said piers 42 and 44 to be delivered to plaintiff as a connecting and participating carrier, and that plaintiff would absorb the State tolls of defendant on all such cargo, and plaintiff filed the same as aforesaid with the said Interstate Commerce Commission and published the same as required by law, and also the concurrence of the defendant therein; that thereunder and under said terminal tariff schedules the State tolls upon said cargo, both outgoing and incoming at piers 42 and 44, and upon all other cargo where the plaintiff was a participating or connecting carrier received from or delivered to the defendant by the plaintiff, were to be and should be absorbed out of the plaintiff's share and part of the through rate of freight upon said cargo as shown by the said Terminal Tariffs of the plaintiff, so published and filed with said commission, and agreed to as to the amount and apportionment of the through rate of freight upon said cargo destined to and received from oriental points; and that the said agreement by plaintiff in said tariffs that plaintiff would "absorb State toll" was incorporated therein to enable and permit the plaintiff under the law to include the same in the amount of its rate for such freight and collect the same from the shipper and/or consignee of the cargo, which the plaintiff did; and on all said cargo the plaintiff did include in and collect from the shipper and/or consignee as a part of the rate and charge of the plaintiff for the [19] land hauled of said cargo as the participating and connecting carrier of said cargo to and from the

vessels of defendant at said piers 42 and/or 44, and retained the amount of the State tolls chargeable upon said cargo, and never did pay any part thereof to the defendant; and that the said sum and amount paid by defendant for State toll as herein stated, was paid by defendant to and for the use and benefit of the defendant, and at its special instance and request, and the amount thereof which would or should be so paid by defendant for said State toll the plaintiff in and under its said agreement in said tariffs, promised and agreed to repay to defendant; and that the apportionment of the rate of freight upon said cargo to be paid to and received by defendant and said plaintiff, was agreed upon by plaintiff and defendant upon the basis of the said tariffs of plaintiff and the concurrence therein of defendant, and said cargo was received and carried by defendant under said agreement and understanding.

4. That during the years 1911, 1912, 1913, 1914 and 1915, the defendant received in the Orient, and carried across the Pacific Ocean and delivered at said piers 42 and 44, to the plaintiff, at San Francisco, California, under said tariffs and concurrence therein, import cargo routed over the line and road of plaintiff, 5,679 tons of cargo and 2,459 bales of wool, and the plaintiff delivered to and defendant received from plaintiff at the said piers 42 and 44 of defendant in San Francisco, California, under said tariffs and concurrence therein, 28,296 tons of export cargo and 22,241 bales of export wool, which defendant carried across the Pacific Ocean and delivered in the Orient for the plaintiff; that under the rules of the

Board of State Harbor Commissioners for the port of San Francisco, the tolls for cargo received on board from and delivered on said piers 42 and 44, from the vessels of defendant, were required to be paid by the vessel receiving or discharging such cargo, and accordingly [20] and for the plaintiff and the use and benefit of the plaintiff, the defendant paid the State tolls for plaintiff on said import and export cargo of five cents per ton, amounting to $1,698.75, and on said import and export wool of one and one-half cents per bale, amounting to $370.50, a total of $2,069.25; and defendant also paid the freight for plaintiff on 30 packages carried by defendant and delivered to plaintiff; making a total of $2,108.38, no part of which plaintiff had ever paid up to November, 1915, nor since except as hereinafter stated.

5. That in November, 1915, the defendant collected the freight on and received at Manila for transportation on its steamship "Mongolia" across the Pacific Ocean and delivery to the plaintiff 1464 drums of cocoanut oil, destined from Manila to Chicago, and routed over the line and road of the plaintiff from San Francisco, California, and delivered the said oil to plaintiff at San Francisco; the proportion of the freight thereon due the plaintiff and collected at Manila by defendant, was $7,341.46, being computed on 1,468,291 pounds at 50¢; and the defendant at the same time carried 30 cases of merchandise on and for which the plaintiff owed and was indebted to defendant in the sum of $39.13.

6. That defendant, in November, 1915, retained out of said $7,341.46, and applied and appropriated

to the payment of the said sum of $2,069.25 due and payable by plaintiff to defendant and no part of which plaintiff had up to that time ever paid to defendant for the said State tolls payable by plaintiff under its said tariffs and which State tolls had been as aforesaid paid by defendant to the State Board of Harbor Commissioners for the port of San Francisco, California, and also said freight charge of $39.13, a total of $2,108.38, and tendered and offered to pay to the plaintiff the balance and remainder of said $7,341.46, to wit: the sum of $5,233.08; that plaintiff refused and ever since has [21] refused to receive or accept payment from defendant of said balance and remainder of said $7,341.46, to wit, the said sum of $5,233.08; and that the defendant always has been and is now ready and willing and hereby and now offers to pay to said plaintiff the said sum and balance of $5,233.08.

7. The defendant is ready and willing and able, and hereby offers and tenders payment to plaintiff of the said sum of $5,233.08, such payment to be made by defendant and received by plaintiff without prejudice in any way, manner or form, legal or equitable, to any and all of the legal and equitable rights of the plaintiff to assert and insist upon its claim in this action and to any and all of the legal rights of the defendant to assert and insist upon its claim in this action to offset against said $7,341.46 the said claim and demand of defendant to retain, apply and appropriate as it did, the said sum of $2,108.38 to the repayment to and reimbursement of defendant for the sum of $2,069.25 for said State

Tolls paid by defendant and said $39.13 for said freight so carried as aforesaid by defendant; and to make its offer and tender good, defendant hereby offers to deposit with plaintiff said sum of $5,233.08, instead of in the court, with the absolute right of the plaintiff to use and apply said $5,233.08 to its own use, as it shall see fit, and without any right or claim by defendant on or to said $5,233.08.

8. That the said outward bound export freight delivered to defendant and inward bound import freight delivered to plaintiff as aforesaid was delivered by plaintiff at and to defendant's vessels at piers 42 and 44, and the wharves of the Southern Pacific Company, Atchison, Topeka and Santa Fe Ry. Co. (Coast Lines) or State Belt Ry. at San Francisco, Cal., mentioned and state in said Terminal Tariffs G. F. D. 35–D, and G. F. D. No. 35–E, as aforesaid, include the said piers 42 and 44, at and from which the vessels of defendant received said export cargo from plaintiff and delivered said import cargo to defendant; and that said State Tolls **[22]** so paid by defendant were and are the State tolls which under said Terminal Tariffs were to be charged to and absorbed by plaintiff as and for a part and portion of its proportion of said through rate and were included in its said legal published Schedule rates and tariffs filed by plaintiff with the United States Interstate Commerce Commission.

WHEREFORE: Defendant prays the judgment of the Court that plaintiff take nothing by its complaint, that there be offset, awarded and adjudged

to defendant and that defendant have and recover the said sum of $2,108.38, as against and from and out of the said claim and demand for $7,341.46 made in said complaint by plaintiff; and for such other and further relief, both general and special, as shall be just and proper in the premises.

Dated June 4, 1917.

KNIGHT & HEGGERTY,
Attorneys for Defendant.

5. June 16, 1917, the plaintiff duly served and filed its demurrer to said amended answer; the following (omitting therefrom the title of court and cause, certificate of counsel thereto and admission of service) is a true copy of said demurrer, to wit:

Demurrer to Amended Answer.

Now comes the plaintiff above named and demurs to the amended answer on file herein and for cause of demurrer specifies:

I.

That said amended answer does not state facts sufficient to constitute a defense.

II.

That said amended answer does not state facts sufficient to constitute a counterclaim. **[23]**

III.

That the first alleged defense in said amended answer contained does not state facts sufficient to constitute a claim.

IV.

That the first alleged defense in said amended answer contained does not state facts sufficient to

constitute a counterclaim.

V.

That the second alleged defense in said amended answer contained does not state facts sufficient to constitute a defense.

VI.

That the second alleged defense in said amended answer contained does not state facts sufficient to constitute a counterclaim.

WHEREFORE, plaintiff prays judgment against defendant as prayed for in the complaint on file herein.

A. R. BALDWIN,
A. P. MATTHEW,
Attorneys for Plaintiff.

6. Thereafter, on July 9th, 1917, the defendant, in open court confessed said demurrer to said amended answer, and defendant was granted leave to serve and file its Second Amended Answer.

7. August 3, 1917, the defendant duly served and filed its second amended answer to said complaint, duly verified; the following (omitting therefrom the title of court, cause, verification and admission of service) is a true copy of said second amended answer, viz.: **[24]**

Second Amended Answer of Pacific Mail Steamship Company.

Now comes the above-named defendant, Pacific Mail Steamship Company, by Knight & Heggerty, its Attorneys, and for its second amended answer to

the complaint in said action filed by leave of Court first had, defendant,—

(1) Denies that during the month of November, 1915, or at any other time, there became or was due from or payable to the said Frank G. Drum and Warren Olney, Jr., or either of them, as Receivers, or otherwise, or at all, the sum of $7,341.46, or any other sum or amount exceeding the sum of $5,233.08, for or as or of money had or received by the defendant for the use and benefit or for the use or benefit of the said Frank G. Drum and Warren Olney, Jr., or either of them as such Receivers, or at all; and defendant alleges that the facts are as set out and stated herein in the separate answer of defendant.

(2) Alleges that in November, 1915, the defendant was and ever since has been and is now willing and ready and in said month offered to pay to the said Receivers and to plaintiff and tendered to the said Receivers and to plaintiff the said sum of $5,233.08; and that the said Receivers refused and the plaintiff then refused and ever since has refused and now does refuse to receive or accept the said sum of $5,233.08, unless defendant would pay plaintiff the sum of $2,069.25, which said sum of $2,069.25 said Receivers and plaintiff then and ever since owed and now owes, and in which sum said Receivers and plaintiff then were and plaintiff is now indebted to defendant and which said sum of $2,069.25 the said Receivers and the plaintiff refused to and had not and have not paid to defendant and have not paid any part thereof. **[25]**

FOR A SEPARATE ANSWER TO SAID COMPLAINT, AND AS AN OFFSET TO AND AGAINST THE DEMAND OF PLAINTIFF the defendant alleges:

1. That the defendant at all times stated in the Complaint and herein was a corporation duly created and existing under the laws of the State of New York, and engaged in the foreign trade of the United States and in the business of transporting passengers and cargo upon the Pacific Ocean, between the ports of San Francisco, California, and Manila, Hong Kong, Shanghai, Kobe, and other ports in China and Japan, and cargo destined thereto and/or carried therefrom on vessels of defendant was received and discharged at piers 42 and/or 44, hereinafter mentioned; and that the plaintiff during all of said times was and now is a corporation duly created and acting under the laws of the State of California, a common carrier of freight and passengers by railroad, and engaged in the business of carrying passengers and freight between San Francisco, California, and Salt Lake, Utah, and connecting with other interstate railroads through the United States; and that the traffic hereinafter stated was, "Competitive Traffic" under the Terminal Tariffs of plaintiff hereinafter stated.

2. Defendant avers, that at all times during the years 1911, 1912 and 1913, the plaintiff had prepared, adopted, published and filed and had on file in the office of and filed with the Interstate Commerce Commission, as required by the laws of the United States, and the rules and regulations of said

Commission, its printed "Terminal Tariff G. F. D. No. 35–D," and during the year 1914 up to March 26, 1916, its printed "Terminal Tariff G. F. D. No. 35–E," stating and naming "Absorptions—*—State Toll—*—and other Terminal Charges, privileges, etc., at all points on line of Western Pacific Railway Company," wherein and whereby it did publish, provide and agree among other things, as follows:—"Absorption of Terminal Charges on Import, Export and Coastwise Traffic at San Francisco and Oakland (Western Pacific Mole), Cal. **[26]**

"1. The rates as shown to and from San Francisco, Cal., in the Western Pacific Ry. Company's Tariffs, or tariffs in which the Western Pacific Ry. Company is shown as a participating carrier, and which are lawfully on file with the Interstate Commerce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from wharves served by those roads, respectively, on all traffic originating at, destined to or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden and Salt Lake City, Utah, and points east thereof.

"The following absorptions will be made when this Company receives the line haul, viz.:—

"At San Francisco, Cal. This Company will absorb switching charge of $2.50 per car for switching

freight, carloads, *to or from wharves served by the Southern Pacific Company,* the Atchison, Topeka & Santa Fe Ry. (Coast Lines) and State Belt Railway; *also will absorb State Toll.* Loading and unloading charges will also be absorbed except on Lumber and its Products.

"At Oakland (Western Pacific Mole), Cal.: This Company will absorb wharfage and handling charges on all freight except lumber and its products and empty carriers returned.

"2. On all competitive traffic, except as provided for in Paragraph No. 1, received from *or delivered to vessels at wharves of the Southern Pacific Company, Atchison, Topeka & Santa Fe Ry. Co.* (Coast Lines) or State Belt Ry., at San Francisco, Cal., this company will absorb switching charge of $2.50 per car; *also will absorb State Toll.*"

And effective September 1, 1915, its printed "Supplement No. 6, to Terminal Tariff, G. F. D. No. 35–E," on the same [27] subject, as follows:

"1. The rates as shown to and from San Francisco, Cal. in the Western Pacific Ry.'s tariffs, or tariffs in which the Western Pacific Ry., is shown as a participating carrier, and which are lawfully on file with the Interstate Commerce Commission, include originating or delivery services of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines), or the State Belt Ry., to or from the wharves served by those roads, respectively, on all traffic originating at, destined to or routed via. points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New

Zealand, South America, and ports upon the Pacific Coast, Albion, Cal., and north thereof on the one hand, and on the other hand, originating at or destined to Ogden, Salt Lake City, or Garfield, Utah, and points east thereof.

"The following absorptions will be made when the Western Pacific Ry, receives the line haul, viz.:—

"*At San Francisco, Cal.;* The Western Pacific Ry. will absorb switching charge of $2.50 per car for switching freight, carloads, to or from wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Ry. (Coast Lines) and State Belt Railway; also will absorb State Toll Loading and unloading charges will also be absorbed except on Lumber and its Products.

"*At Oakland (Western Pacific Mole), Cal.* The Western Pacific Ry. will absorb wharfage and handling charges on all freight except Lumber and its Products and Empty Carriers returned.

"2. On all competitive traffic, except as provided for in Paragraph No. 1, received from or delivered to vessels at wharves of the Southern Pacific Company (Piers 42 and 44) or Atchison, Topeka & Santa Fe Ry. Co. (Coast Lines) (Pier 54), at San Francisco, Cal. the Western Pacific Ry. will absorb switching charge of $2.50 per car; *also will absorb State Toll.*"
[28]

That the foregoing Terminal Tariffs were by plaintiff at all times as aforesaid herein mentioned duly and legally made, published and filed with the Interstate Commerce Commission as required by

law and the rules of said commission, for the inland or rail carriage of import and export cargo—and of competitive traffic by plaintiff and said Receivers when cargo was received from defendant by plaintiff and said Receivers at said piers 42 and/or 44 and when cargo was delivered to defendant by plaintiff at said piers 42 and 44.

3. That during the years 1911, 1912, 1913, 1914 and 1915, the defendant received in the Orient, and carried across the Pacific Ocean and delivered at said piers 42 and 44, to the plaintiff, and during the year 1915, after March 4, 1915, to said plaintiff and said Receivers, at San Francisco, California, under said tariffs, import cargo routed over the line and road of plaintiff, 5679 tons of cargo and 2459 bales of wool, and the plaintiff delivered to and defendant received from plaintiff during said years 1911, 1912, 1913 and 1914, at the said piers 42 and 44 of defendant in San Francisco, California, under said tariffs, 28,296 tons of export cargo and 22,241 bales of export cotton, which defendant carried across the Pacific Ocean and delivered in the Orient for the plaintiff; that under the rules of the Board of State Harbor Commissioners for the port of San Francisco, the tolls for said cargo received on board from plaintiff and delivered on said piers 42 and 44, from the vessels of defendant for the plaintiff and for said Receivers, were required to be paid by the vessels of defendant receiving and/or discharging such cargo, and accordingly and for the plaintiff and the said Receivers and for the use and benefit of the plaintiff and said Receivers, the defendant paid the State

tolls for plaintiff and said Receivers, with the knowledge of plaintiff and said Receivers and according to the general custom then existing at the said port of San Francisco, on said import and export cargo of five cents per **[29]** ton, amounting to $1,698.75, and on said import and export wool and/or cotton of one and one-half cents per bale, amounting to $370.50, a total of $2,069.25; and defendant also paid the freight for plaintiff and said Receivers on 30 packages carried by defendant and delivered to plaintiff; making a total of $2,108.38, no part of which plaintiff or said Receivers had ever paid up to November, 1915, and no part of which has since been paid except as hereinafter stated.

4. That in November, 1915, the defendant collected the freight on and received at Manila for transportation on its steamship "Mongolia" across the Pacific Ocean and delivery to the plaintiff and said Receivers 1464 drums of cocoanut oil, destined from Manila to Chicago, and routed over the line and road of the plaintiff from San Francisco, California, and delivered the said oil to plaintiff and said Receivers at San Francisco, at said piers 42 and 44; and that the proportion of the freight thereon due the plaintiff and said Receivers and collected at Manila by defendant, was $7,341.46, being computed on 1,468,291 pounds at 50¢; and the defendant at the same time carried 30 cases of merchandise on and for which the plaintiff and said Receivers owed and were indebted to defendant in the sum of $39.13.

5. That defendant, in November, 1915, retained out of said $7,341.46, and applied and appropriated

to the payment of the said sum of $2,069.25 due and payable by plaintiff and said Receivers to defendant and no part of which plaintiff or said Receivers had ever paid to defendant for the said State tolls payable by plaintiff and said Receivers under its said tariffs and which State tolls had been as aforesaid paid by defendant to the State Board of Harbor Commissioners for the port of San Francisco, California, for the use and benefit of plaintiff and the said Receivers, and also said freight charge of $39.13, a total of $2,108.38, and tendered and offered to pay to the plaintiff and said Receivers the balance and remainder of said $7,341.46, to wit: **[30]** the sum of $5,233.08; that plaintiff and said Receivers then refused and ever since refused and now refuse to receive or accept payment from demendant of said balance and remainder of said $7,341.46, to wit: the said sum of $5,233.08; and that the defendant always has been and is now ready and willing to pay to plaintiff and said Receivers, and hereby and now offers to pay to said plaintiff the said sum and balance of $5,233.08.

6. The defendant is ready and willing and able, and hereby offers and tenders payment to plaintiff of the said sum of $5,233.08, such payment to be made by defendant and received by plaintiff without prejudice in any way, manner or form, legal or equitable, to any and/or all of the legal and equitable rights of the plaintiff to assert and insist upon its claim to said sum of $2,069.25 in this action and to any and all of the legal rights of the defendant to assert and insist upon its claim in this action to off-

set against said $7,341.46 the said claim and demand of defendant to retain, apply and appropriate as it did, the said sum of $2,108.38, to the repayment to and reimbursement of defendant for the sum of $2,069.25 for said State tolls so paid by defendant and said $39.13 for said freight so carried as aforesaid by defendant; and to make its offer and tender good, defendant hereby offers to pay to and/or deposit with plaintiff said sum of $5,233.08, with the absolute right of the plaintiff to use and apply said $5,233.08 to its own use, as it shall see fit, and without any right or claim by defendant on or to said $5,233.08, or for repayment thereof.

7. That the said outward bound export freight delivered to defendant by plaintiff and said inward bound import freight delivered to plaintiff and said Receivers by defendant as aforesaid, was delivered by plaintiff at and to and by defendant to plaintiff and said Receiver's from defendant's vessels at said piers 42 and 44; and the wharves served by and the wharves of the Southern Pacific Company, Atchison, Topeka and Santa Fe Ry. Co. (Coast lines) or [31] State Belt Ry. at San Francisco, Cal., mentioned and stated in said Terminal Tariffs G. F. D. No. 35–D, and G. F. D. 35–E, at which and upon which cargo as agreed and stated by plaintiff and said Receivers in the said tariffs, the plaintiff and said Receivers "also will absorb State Toll," as aforesaid, include the said piers 42 and 44, at and from which the vessels of defendant received said export cargo from plaintiff and delivered said import cargo to plaintiff and said Receivers; and that

said State tolls so paid by defendant were and are the State tolls which under and as stated in said Terminal Tariffs were to be charged to and absorbed by plaintiff and said Receivers as and for a part and portion of its proportion of said through rate and were included and stated in its said legal, published scheduled rates and tariffs filed by plaintiff with the United States Interstate Commerce, to be absorbed by plaintiff and said Receivers, as aforesaid.

WHEREFORE: Defendant prays the judgment of the Court that plaintiff take nothing by its complaint, that there be offset, awarded and adjudged to defendant and that defendant have and recover the said sum of $2,108.38, as against and from and out of the said claim and demand for $7,341.46 made in said complaint by plaintiff; and for such other and further relief, both general and special as shall be just and proper in the premises; and for its costs.

Dated July 28, 1917.

KNIGHT & HEGGERTY,
Attorneys for Defendant.

C. W. DURBROW,
Of Counsel for Defendant. [32]

8. August 13, 1917, the plaintiff duly served and filed its demurrer to said second amended answer, and also its motion for judgment on the pleadings; the following (omitting therefrom the title of court, cause, certificate of counsel thereto, and admission of service) and true copies of said demurrer to said second amended answer and said motion for judgment on the pleadings, viz.:

Notice of Motion for Judgment on the Pleadings.

To the Defendant Herein, Pacific Mail Steamship Company, a Corporation, and to Knight & Heggarty, Its Attorneys:

You and each of you will hereby take notice that on Monday, the 20th day of August, 1917, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the above-named plaintiff, The Western Pacifis Railroad Company, will move said court at the courtroom thereof, in the Postoffice Building, at the corner of Seventh and Mission Streets, in the city and county of San Francisco, State of California, for an order for a judgment for plaintiff on the pleadings on file herein.

Said motion will be made upon the ground that the defendant, in and by its second amended answer on file herein, admits that there is due, owing and unpaid from the defendant to the plaintiff the sum of $7,341.46, as prayed for in the complaint, and that the said second amended answer does not state facts sufficient to constitute a defense to the cause of action, or any portion thereof, stated in the complaint on file herein, and that the said second amended answer does not state facts sufficient to constitute a counterclaim to the cause of action, or any portion thereof, stated in the complaint on file herein.

Said motion will be made upon the further ground that the said second amended answer is substantially the same in its allegations **[33]** as the original answer on file herein.

Said motion will be based upon all the records, pleadings, files and papers in the above-entitled action and upon this notice of motion, and particularly upon the original answer on file herein and the demurrer to said original answer and upon the amended answer on file herein and the demurrer to said amended answer, which said papers will be used on the hearing of this motion.

A. R. BALDWIN,
ALLAN P. MATTHEW,
Attorneys for Plaintiff.

Demurrer to Second Amended Answer.

Now comes the plaintiff above named and demurs to the second amended answer on file herein and for cause of demurrer specifies:

I.

That said second amended answer does not state facts sufficient to constitute a defense.

II.

That said second amended answer does not state facts sufficient to constitute a counterclaim.

III.

That the first alleged defense in said second amended answer contained does not state facts sufficient to constitute a defense.

IV.

That the first alleged defense in said second amended answer contained does not state facts sufficient to constitute a counterclaim. **[34]**

V.

That the second alleged defense in said second

amended answer contained does not state facts sufficient to constitute a defense.

VI.

That the second alleged defense in said second amended answer contained does not state facts sufficient to constitute a counterclaim.

WHEREFORE, plaintiff prays judgment against defendant as prayed for in the complaint on file herein.

A. R. BALDWIN,
A. P. MATTHEW,
Attorneys for Plaintiff.

9. Thereafter, and on August 27th, 1917, said demurrer of plaintiff to said second amended answer and said motion of plaintiff for judgment on the pleadings came on duly and regularly to be heard, and in support of said motion there was read into the record and introduced in evidence and used upon said hearing all the records, pleadings, files and papers in said action hereinbefore mentioned; thereafter, after argument and due consideration, the Court sustained the said demurrer of the plaintiff to said second amended answer, and granted said motion of plaintiff for judgment on the pleadings, and rendered its judgment and ordered that judgment be given and made, and judgment was then and there given and made and entered in favor of plaintiff and against defendant for the principal sum of $8,235.08, together with interest thereon at the rate of 7% per annum, and costs of court, as prayed for by plaintiff in its said complaint, to each and all of which orders, rulings and judgment the defendant then and there

excepted and now excepts, and assigns said rulings, orders and judgment as errors. **[35]**

10. The time of the defendant within which to prepare and propose for settlement and allowance its bill of exceptions, was and has been duly and legally extended by stipulation and agreement of the plaintiff and its attorneys, and by orders of this court duly given, made, entered and filed of record herein.

And now, the defendant does hereby and now propose and present this, its bill of exceptions, to the said rulings, orders and judgment, and prays the Court to settle and allow the same as a true and correct bill of exceptions.

Dated ——, 1917.

KNIGHT & HEGGERTY,
Attorneys for Defendant.

C. W. DURBROW,
Of Counsel for Defendant.

Stipulation Re Bill of Exceptions.

The foregoing bill of exceptions is correct, and may be allowed and certified by the Honorable Wm. C. Van Fleet, Judge of said District Court.

Dated October 22, 1917.

A. R. BALDWIN,
ALLAN P. MATTHEW,
Attorneys for Plaintiff,
KNIGHT & HEGGERTY,
Attorneys for Defendant.

C. W. DURBROW,
Of Counsel for Defendant.

Order Settling and Allowing Bill of Exceptions.

The foregoing bill of exceptions is hereby settled and allowed as a true and correct bill of exceptions in said cause.

Dated November 14th, 1917.

WM. C. VAN FLEET,
United States District Judge. **[36]**

Due service and receipt of a copy of the within proposed bill of exceptions of defendant is hereby admitted this 25th day of September, 1917.

A. R. BALDWIN,
A. P. MATTHEW,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 14, 1917. Walter B. Maling, Clerk. **[37]**

(Title of Court and Cause.)

Petition for Writ of Error by Defendant, Order Allowing Writ and Supersedeas, Fixing Bond to Stay Execution, and the Bond for Costs:

To the Honorable District Court of the United States, Southern Division, Northern District of California, Second Division:

The petitioner, Pacific Mail Steamship Company (a Corporation), respectfully represents and petitions as follows:

That heretofore, to wit, on the 27th day of August, 1917, by final judgment of the District Court of the United States, in and for the Southern Division of *the District Court of the United States for* the North-

ern District of California, Second Division, rendered and entered in an action at law therein pending and in which The Western Pacific Railroad Company (a Corporation), is plaintiff and your petitioner is defendant, it was ordered and adjudged that the demurrer of the plaintiff to the second amended answer of the defendant to the complaint of plaintiff be sustained, and that the motion of the plaintiff for judgment on the pleadings in favor of plaintiff and against defendant be granted and that the plaintiff do have and recover against the defendant a judgment for the sum of $8,235.08 and costs, and judgment was entered accordingly.

That your petitioner claims a writ of error against said judgment from the United States Circuit Court of Appeals for the Ninth Circuit, and in that behalf avers that there is manifest error in the said order sustaining said demurrer, and in the order granting said motion for judgment on the pleadings, and in the said judgment in favor of plaintiff and against defendant, and as set out in the assignment of errors filed herewith.

WHEREFORE, your petitioner prays that petitioner be [38] allowed herein a writ of error upon the said judgment rendered and entered against petitioner from the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court of the United States for the Southern Division of the Northern District of California, Second Division, to reverse the said judgment; that the defendant be awarded a supersedeas upon said judgment, that the amount of the bond to be given by defendant to stay

the execution of said judgment pending final decision on said writ of error and for costs upon said writ of error, be fixed, and for all necessary orders and process.

Dated September 24, 1917.

KNIGHT & HEGGERTY,
CHARLES J. HEGGERTY,
Attorneys for Petitioner.

C. W. DURBROW,
Of Counsel for Petitioner.

Order Allowing Writ of Error, Granting Supersedeas, Fixing Bond to Stay Execution and for Costs.

The foregoing petition for a writ of error is granted and allowed; the writ of error and the supersedeas therein prayed for pending final decision on said writ of error are allowed; the bond to be given by the defendant to stay the execution of said judgment including interest and delay is fixed at the sum of $10,000, and the bond for costs on said writ of error is fixed at the sum of $300; and that both said bonds may be included in one written instrument.

Dated September 25th, 1917.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]:Filed Sep. 25, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[39]**

(Title of Court and Cause.)

Assignment of Errors.

Now comes the Pacific Mail Steamship Company (a corporation), the defendant in the above-entitled action at law, by its attorneys, Knight & Heggerty, and its counsel C. W. Durbrow, and avers and states, that in the record and proceedings herein in the Southern Division of the United States District Court, for the Northern District of California, Second Division, and in the judgment therein, there is manifest error to the great prejudice of the defendant Pacific Mail Steamship Company, in this, to wit:

1. The Court erred in sustaining the demurrer of plaintiff to the second amended answer of the defendant to the complaint of plaintiff in the said cause, and in holding and deciding that the said answer did not constitute a sufficient answer or defense to said action and complaint, and that the separate answer of defendant to said complaint and offset therein in said answer alleged, did not constitute a sufficient answer to the said complaint, and action, and that the facts alleged in said separate answer of defendant to said complaint contained in said second amended answer, did not constitute and was not a sufficient or any answer to the said complaint and action, and did not constitute and was not a legal or sufficient or any offset to or against the demand of plaintiff or the cause of action of plaintiff or to entitle defendant to offset against the amount of plaintiff's demand, the said claim and amount of said offset and demand of defendant arising and existing as stated and set out

in said separate answer and in ruling and deciding that said second amended answer did not contain or state denials or facts sufficient to constitute an answer to said complaint or an offset to or against the cause of action or demand of plaintiff, and in granting the motion of [40] plaintiff for judgment and rendering judgment in favor of plaintiff and against defendant on the pleadings.

2. The Court erred in sustaining the demurrer of the plaintiff to the second amended answer of defendant and to the separate answer and offset therein stated and pleaded by defendant against the recovering by plaintiff of any amount or judgment without or before offsetting against and deducting from said demand of plaintiff the said offset and demand of defendant against plaintiff, and in granting the motion of plaintiff for and in rendering judgment on the pleadings in favor of plaintiff and against defendant.

3. The Court erred in granting the motion of plaintiff for judgment on the pleadings, and rendering judgment in favor of plaintiff without offsetting the demand of defendant against the demand of plaintiff alleged in the separate answer of plaintiff in said second amended answer.

4. The Court erred in holding and deciding that the facts stated in said separate answer did not constitute a legal or any offset to or against the demand and cause of plaintiff, and that defendant was not entitled to offset against the demand of plaintiff the claim and demand of defendant against plaintiff set out in said separate answer contained in the second amended answer of defendant.

5. The Court erred in holding and deciding, that defendant was not entitled to have or recover against plaintiff a judgment for the amount of State tolls, etc., alleged in said separate answer to have been paid by defendant for and to the use and benefit of plaintiff; and in deciding and holding that plaintiff did not in its tariffs set out in said separate answer assume and agree to absorb and pay the said State tolls so paid by defendant upon the competitive traffic alleged in said separate answer, and that plaintiff [41] was not legally liable for and should not be required to pay or refund to defendant the said State tolls, etc., paid for plaintiff by defendant as alleged in said separate answer.

6. The Court erred in sustaining and holding that plaintiff was entitled to a judgment against defendant for the whole amount of its said demand and claim, and without any offset against the same for and without offsetting or deducting the said sums and amounts paid by defendant for plaintiff as alleged in said separate answer, and in rendering judgment in favor of plaintiff and against defendant for the entire amount of plaintiff's demand without offsetting and deducting the said claims and demands of defendant against plaintiff as stated and alleged in said separate answer.

7. The Court erred in not holding and deciding that the second amended answer of defendant contained sufficient denials of material allegations of the complaint of plaintiff, and that the material facts stated in the separate answer and offset contained in said answer were sufficient to and did state a legal

and sufficient answer to said complaint, and to entitle defendant to offset and to a judgment of said Court offsetting against and deducting from the claim and demand of plaintiff, the sums and amount stated in said separate answer to have been paid by defendant for the use and benefit and with the knowledge of plaintiff and according to general custom for State tolls, and for advanced freight and freight charges, and which State tolls plaintiff in and by its tariffs in said separate answer stated, had agreed to absorb and pay; and that the plaintiff was legally entitled to recover only the balance of its claim and demand which defendant in its separate answer was ready and willing and offered and had offered and tendered to and to pay plaintiff as set forth in said separate answer, and that plaintiff was not legally entitled to have or receive or recover judgment for any interest upon the said balance of its claim and demand, because thereof. **[42]**

8. The Court erred in not overruling the demurrer of plaintiff to said second amended answer and to said separate answer therein contained, and in not denying and overruling the motion of plaintiff for judgment on the pleadings.

9. The Court erred in allowing and adjudging that plaintiff recover any interest upon the portion, balance and amount of the claim and demand of plaintiff which the defendant had offered and tendered payment of to plaintiff and which plaintiff refused to accept, and which portion, balance and amount defendant in its said separate answer offered and tendered and was willing, ready and able to pay

and offered and tendered to pay over and deliver to plaintiff.

10. The Court erred in holding and deciding in sustaining and granting the motion of plaintiff for judgment on the pleadings, that the second amended answer of defendant is substantially the same in its allegations as the original answer of defendant, and as the amended answer of defendant, and that the said original answer and said amended answer were and had been decided and held upon the respective demurrer of plaintiff to each thereof by the Court to be not a sufficient legal answer to said complaint or to state facts sufficient to constitute a legal answer to said complaint or a legal offset to the claim and demand of plaintiff.

11. The Court erred in holding and deciding that the plaintiff was not legally bound and required to absorb and to refund and pay to defendant the said sums and amounts paid by defendant for State tolls for the use and benefit and with the knowledge of plaintiff and according to the general custom at and of the port of San Francisco, and that plaintiff had not in and by its said tariffs agreed to absorb and pay the said State tolls upon said traffic; and in holding and deciding that defendant was legally obligated and required to pay itself on said traffic said [43] State tolls under the law and the said tariffs, and the rules of said Harbor Commissioners, and that plaintiff should not be required to absorb, refund or repay the same to defendant.

WHEREFORE: By reason of the errors aforesaid, the defendant Pacific Mail Steamship Com-

pany, prays that the orders of said Court sustaining the demurrer of plaintiff to the second amended answer of defendant and to the separate answer of defendant therein contained, and in granting the motion of plaintiff and ordering judgment for plaintiff on the pleadings, and in rendering judgment in favor of plaintiff and against defendant, and that the same be avoided, annulled and reversed, and altogether held for nothing, and that defendant be restored to all things which it hath lost by occasion thereof and of said judgment; and that defendant recover its costs upon this writ or error.

Dated September 24th, 1917.

KNIGHT & HEGGERTY,
CHARLES J. HEGGERTY,
Attorneys for Defendant.

C. W. DURBROW,
Of Counsel for Defendant.

[Endorsed]: Filed Sep. 25, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

Bond on Writ of Error, etc.

KNOW ALL MEN BY THESE PRESENTS, that the Fidelity & Deposit Co. of Maryland, as surety, is held and firmly bound unto The Western Pacific Railroad Company, in the full and just sum of Ten Thousand Three Hundred ($10,300) Dollars, to be paid to the said The Western Pacific Railroad Company, its successors, representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

SEALED WITH OUR SEALS AND DATED this 26th day of September, 1917.

WHEREAS, lately at the District Court of the United States, Southern Division, Northern District of California, Second Division, in an action at law depending in said Court, between The Western Pacific Railroad Company, plaintiff, and Pacific Mail Steamship Company, Defendant, Numbered 16,021, therein, a final judgment was rendered and entered on the 27th day of August, 1917, in favor of the said plaintiff and against the said defendant, for the sum of Eight Thousand Two Hundred Thirty-five and 08/100 ($8,235.08) Dollars, together with interest thereon from said 27th day of August, 1917, at seven (7%) per cent per annum, and Nineteen and 20/100 ($19.20) Dollars costs; and said defendant having obtained from said Court a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said judgment in the aforesaid action at law, and a citation directed to the said plaintiff, The Western Pacific Railroad Company, citing and admonishing the said plaintiff to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said defendant Pacific Mail Steamship Company shall prosecute [45] the said writ of error to effect, and pay the said judgment and answer all damages and costs, including just damages for delay, and costs and interest on said writ of error, if the said defendant fail

to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AND IT IS FURTHER HEREBY EXPRESSLY AGREED that, in case of a breach of any condition of the above obligation and this Bond, the said District Court of the United States, Southern Division, Northern District of California, Second Division, may upon notice to the Fidelity & Deposit Co. of Maryland, of not less than ten days, proceed summarily in the said action at law therein pending to ascertain the amount which said Fidelity & Deposit Co. of Maryland is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

The premium charged for this bond is $103 per annum.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By C. K. BENNETT,
Attorney in Fact.

EDWIN C. PORTER,
Agent.

[Seal Fidelity and Deposit C. of Maryland.]

Approved.

WM. C. VAN FLEET,
Judge.

Due service and receipt of a copy of the within Bond on appeal is hereby admitted this 26th day of September, 1917.

A. R. BALDWIN,
A. P. MATTHEW,
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[46]**

(Title of Court and Cause.)

Praecipe for Record on Writ of Error.

To the Clerk of said Court:

Sir: Please incorporate the following papers in the record on writ of error to the U. S. C. C. A.

Complaint;

Judgment;

Bill of exceptions;

Petition for writ of error;

Assignment of errors;

Order allowing writ of error and bond on writ of error.

KNIGHT & HEGGERTY,

Attorneys for Deft.

[Endorsed]: Filed November 20, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[47]**

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,021.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing forty-seven (47) pages, numbered from 1 to 47, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to $23.05; that said amount was paid by the attorneys for the defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 2d day of January, A. D. 1918.

[Seal] WALTER B. MALING,

Clerk United States District Court, Northern District of California.

By J. A. Schaertzer,

Deputy Clerk. [48]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Pacific Mail Steamship Company, a corporation, plaintiff in error, and The Western Pacific Railroad Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Pacific Mail Steamship Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of September, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,

Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,

Deputy Clerk.

Allowed by

WM. C. VAN FLEET,

United States District Judge.

Service of the within Writ of Error upon the defendant in error, The Western Pacific Railroad Company, by copy thereof, admitted this 27th day of September, 1917.

A. R. BALDWIN,

ALLAN P. MATTHEW,

Attorneys for Defendant in Error.

[Endorsed]: Original. No. 16,021. United States District Court for the Northern District of California. Pacific Mail Steamship Company, Plaintiff in Error, vs. The Western Pacific Railroad Company, Defendant in Error. Writ of Error. Filed Sep. 27, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Cricuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [50]

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The Western Pacific Railroad Company, a corporation, GREETING:

You are hereby cited and admonished to be and ap-

pear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Pacific Mail Steamship Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 26th day of September, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge.

Service of the within Citation upon the defendant in error, The Western Pacific Railroad Company, by copy thereof, admitted this 27th day of September, 1917.

A. R. BALDWIN,
ALLAN P. MATTHEW,
Attorneys for Defendant in Error.

[Endorsed]: Original. No. 16,021. United States District Court for the Northern District of California. Pacific Mail Steamship Company, Plaintiff in Error, vs. The Western Pacific Railroad Company,

Defendant in Error. Citation on Writ of Error. Filed Sep. 27, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [51]

[Endorsed]: No. 3109. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Mail Steamship Company, a Corporation, Plaintiff in Error, vs. The Western Pacific Railroad Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed January 4, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul O'Brien,

Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Defendant in Error.

Order Extending Time to and Including November 26, 1917, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error in the above-entitled case may have to and including the 26th day of November, within which to file the record and docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 25, 1917.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 25, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Defendant in Error.

Order Extending Time to and Including December 26, 1917, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error may have to and including the 26th day of December, 1917, within which to file the

record and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 26, 1917.

WM. C. VAN FLEET,
Judge U. S. District Court.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to December 26, 1917, to File Record Thereof and to Docket Case. Filed Nov. 26, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC MAIL STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation,

Defendant in Error.

Order Extending Time to and Including January 4, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the Pacific Mail Steamship Company, a corporation, may have to and including January 4, 1918, within which to file the record and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,
District Judge.

December 26, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and including January 4, 1918, to File Record Thereof and to Docket Case. Filed Dec. 26, 1917. F. D. Monckton, Clerk.

No. 3109. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to January 4, 1918, to File Record thereof and to Docket Case. Re-filed Jan. 4, 1918. F. D. Monckton, Clerk.

No. 3109

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MAIL STEAMSHIP COMPANY,
(a corporation),
Plaintiff in Error,

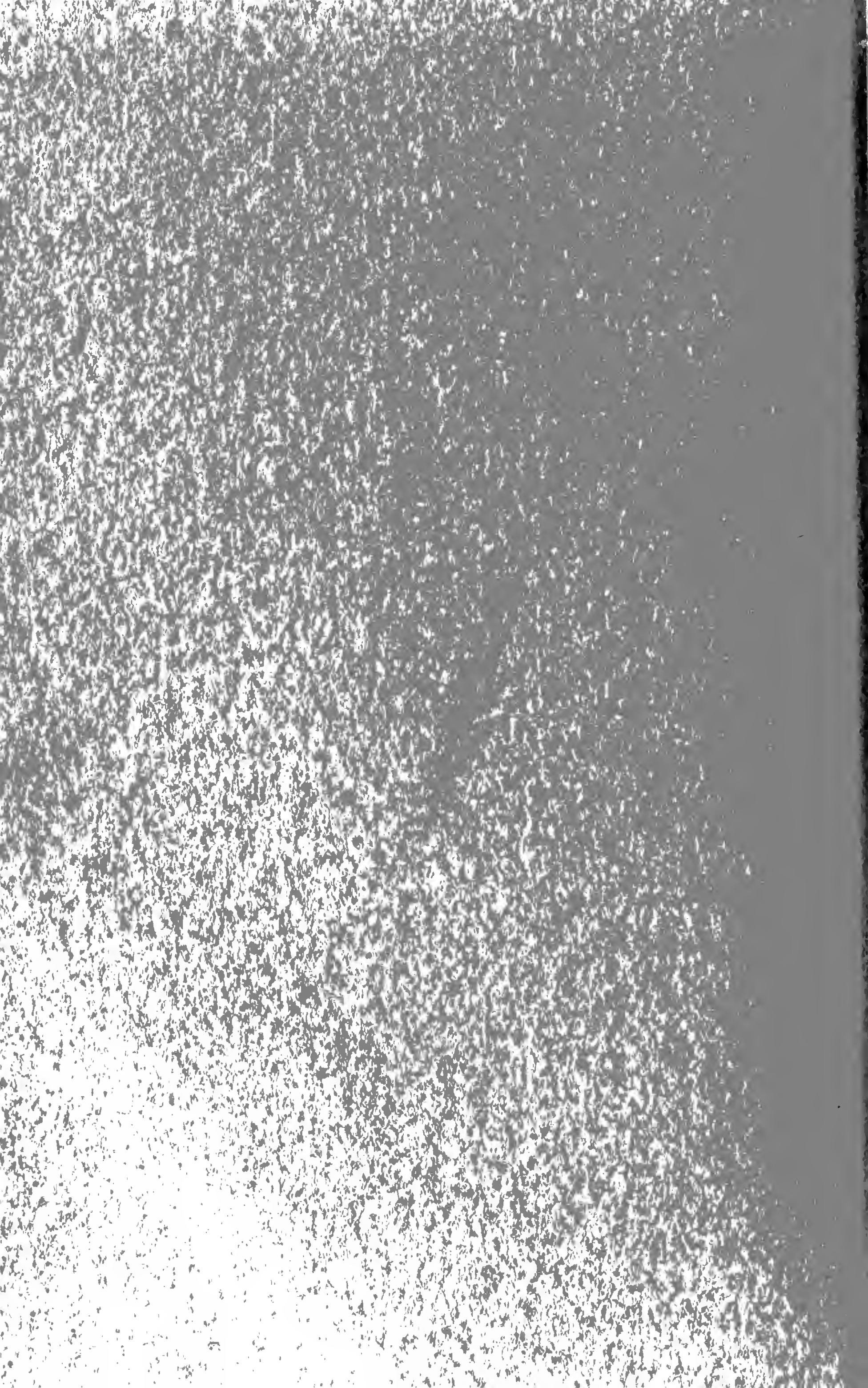
vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
(a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

KNIGHT & HEGGERTY,
CHARLES J. HEGGERTY,
Attorneys for Plaintiff in Error.

C. W. DURBROW,
Of Counsel.



No. 3109

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC MAIL STEAMSHIP COMPANY,
(a corporation),
Plaintiff in Error,
vs.
THE WESTERN PACIFIC RAILROAD COMPANY,
(a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The defendant in error, plaintiff in the Court below, instituted this action to recover the sum of $7,341.46, representing the amount accruing to defendant in error, as the inland proportion of freight charges on through shipments moving between points in the United States and Oriental ports.

Demurrers were sustained by the District Court to the original, first amended and second amended answers, interposed by the defendant in the District Court, and an order was entered for judgment

on the pleadings in favor of the defendant in error and against the plaintiff in error for the sum of $8,235.08, together with interest and costs.

In the answer and separate answer contained in the second amended answer, plaintiff in error admitted that the sum of $5,233.08 of the amount claimed was due and payable to the defendant in error, but denied that any sum exceeding this amount had, at any time, become due, or was payable, to defendant in error. The answer averred that plaintiff in error had tendered to defendant in error the sum of $5,233.08, and that defendant in error had refused to accept this sum unless plaintiff in error paid to defendant in error the sum of $2,069.25 in addition thereto.

The defendant in the Court below incorporated in its answers a separate answer to plaintiff's complaint as an offset to plaintiff's demand.

The shipments specified in the second amended answer were transported by the rail and water carriers between points in the United States and Oriental ports, the interchange between the rail and ocean carriers being effected at the port of San Francisco, at Piers 42 and 44.

In the separate answer contained in the second amended answer, plaintiff in error pleaded as an offset to the claim made by defendant in error that the terminal tariffs of the defendant in error, published and filed as required by the Act to Regulate Commerce, provided that defendant in error would absorb State toll on the shipments specified in the

second amended answer, and it was alleged that these terminal tariffs, while published by defendant in error, were applicable to import and export cargo interchanged by the parties at Piers 42 and 44.

The answer further averred that plaintiff in error had transported the shipments specified in the second amended answer between the port of San Francisco and Oriental ports, the shipments being received and delivered at Piers 42 and 44; and that under the rules of the Board of State Harbor Commissioners of the port of San Francisco plaintiff in error was required to initially pay the charges assessed for State toll; and that these charges were paid by plaintiff in error for the defendant in error, with the knowledge of defendant in error and "according to the general custom then existing at the port of San Francisco * * * ", the charges aggregating the sum of $2,069.25, and that plaintiff in error also paid the freight charges of defendant in error on 30 packages transported by plaintiff in error and delivered to defendant in error, amounting to a total of $2,108.38, no part of which has been paid by defendant in error to plaintiff in error.

That the plaintiff in error tendered and offered to pay to the defendant in error the difference between $7,341.46, the amount collected by the plaintiff in error, as hereinbefore stated, and the amount due from defendant in error to plaintiff in error on account of the State tolls paid by the plaintiff

in error, and freight charges paid by plaintiff in error for defendant in error.

The offer and tender of the plaintiff in error to pay to defendant in error the sum of $5,233.08 was renewed and affirmed, and plaintiff in error prayed judgment for the sum of $2,108.38.

Judgment, as has been stated, was awarded defendant in error for the full amount of the claim, including the amount of $5,233.08 tendered by plaintiff in error to defendant in error, and for interest and costs, whereupon plaintiff in error brought the case to this Court by writ of error.

Specifications of Errors Upon Which Plaintiff in Error Relies.

There are eleven specifications in the assignment of errors contained in the transcript (Tr. pp. 47-51), many of the specifications being, however, to the effect that it was error to sustain the demurrer interposed by defendant in error, and to grant its motion for a judgment on the pleadings, upon the ground that the answer did not constitute a sufficient answer or defense, and that the separate answer interposed by plaintiff in error and the offset therein set forth did not constitute a sufficient answer to the complaint and action, and did not constitute, and was not a legal, or sufficient or any offset to or against the demand of defendant in error, or the cause of action of defendant in error to entitle

plaintiff in error to offset the amount of the demand specified in said complaint and that, therefore, error was committed by the trial court in awarding any judgment to plaintiff without offsetting against and deducting from the demand of defendant in error the offset pleaded by plaintiff in error; and that the Court erred in holding and deciding that plaintiff in error was not entitled to have and recover against defendant in error a judgment for the amount of State tolls, which plaintiff in error alleged in its separate answer to have been paid by plaintiff in error for and to the use and benefit of the defendant in error, and in deciding and holding that defendant in error did not, in its tariffs, specified in the separate answer, assume and agree to absorb and pay the State tolls which had been paid by plaintiff in error, and in holding that defendant in error was not legally liable for, and should not be required to pay or refund to plaintiff in error the State tolls paid by plaintiff in error for the defendant in error, as alleged in the separate answer of plaintiff in error.

Plaintiff in error further relies upon the specification that the Court erred in not holding and deciding that the second amended answer of plaintiff in error contained sufficient denials of material allegations of the complaint, and that the material facts stated in the separate answer and offset contained in said separate answer were not sufficient and did not state a sufficient and legal answer to said complaint, entitling plaintiff in error to a judgment in

its favor offsetting against and deducting from the claim and demand of the defendant in error the sums and amounts specified in said separate answer, alleged to have been paid by plaintiff in error for the use and benefit, and with the knowledge, of defendant in error, and according to the general custom for the payment of State tolls and which, by its tariffs, said defendant in error had agreed to absorb and pay, and in not holding that defendant in error was legally entitled to recover a judgment only for the balance of its claim, which plaintiff in error had tendered to defendant in error and agreed to pay, as alleged in said separate answer, and in holding that defendant in error was legally entitled to have or receive or recover judgment for any interest upon the balance of the said claim.

Plaintiff in error further relies upon the specification that the Court erred in adjudging that defendant in error recover any interest upon the amount of the claim made by the defendant in error which plaintiff in error had offered and tendered to defendant in error, and which defendant in error refused to accept.

Plaintiff in error further relies upon the specification that the Court erred in holding and deciding that defendant in error was not legally bound and required to absorb and to refund and pay to plaintiff in error the sums paid by plaintiff in error for State tolls for the use and benefit and with the

knowledge of defendant in error and according to the general custom at the port of San Francisco, and in holding that defendant in error had not agreed by its said tariffs to absorb or pay said State tolls upon said traffic, and in holding that plaintiff in error was legally obligated or required to pay said tolls on said traffic under the provisions of said tariff and rules of the Harbor Commissioners of the port of San Francisco.

Argument.

THE ISSUES.

Plaintiff in the Court below demanded judgment for the sum of $7,341.46, representing the amount collected by defendant in the Court below as the rail proportion accruing to the defendant in error (plaintiff below) on through freight shipments from interior points in the United States to Oriental destinations. This fact is not in dispute.

In its separate answer, plaintiff in error sought to offset against this claim the sum of $2,069.25, representing the amount which plaintiff in error had paid to the State of California for and on behalf of defendant in error on account of State tolls assessed under the rules of the Board of State Harbor Commissioners for the port of San Francisco, and also the sum of $39.13, representing an amount due the ocean carrier from the rail carrier for

services rendered by the ocean carrier in transporting freight shipments for the rail carrier on its steamers from the port of San Francisco to Oriental ports. It was specifically alleged in the separate answer that the Steamship Company had tendered the Railroad Company the sum of $5,233.08, or the difference between the amount claimed by the defendant in error and the amount sought to be offset by the plaintiff in error.

The amount in controversy, therefore, is the sum of $2,108.38.

The sole questions presented to the Court for determination are whether the plaintiff in error was entitled to offset the sum of $2,108.38 against the amount demanded by the complaint, and whether the allegations contained in the second amended answer constituted a defense and offset; and whether defendant in error was or is entitled to any interest in view of the tender and offers of payment made by plaintiff in error as alleged in its Answer (Tr. p. 30) and Separate Answer (Tr. pp. 37-38).

No question was or is made that, in an action such as this, the plaintiff in error was not lawfully entitled, under the rules of Pleading and Practice, to interpose a separate answer, pleading an offset; but by its demurrer to the second amended answer, defendant in error raised the question as to the sufficiency of the facts pleaded in the second amended answer to constitute a defense, offset, or counterclaim.

THE SEPARATE ANSWER AND THE OFFSET PLEADED THEREIN CONTAIN ALLEGATIONS SUFFICIENT TO CONSTITUTE AN ANSWER TO THE COMPLAINT AND AN OFFSET THERETO.

The facts contained in the pleadings.

The Pacific Mail Steamship Company, the plaintiff in error, is engaged in the business of transporting passengers and freight between the port of San Francisco and Oriental ports, cargo being received and discharged at Piers 42 and 44 at the port of San Francisco.

The defendant in error is a common carrier of freight and passengers between eastern points in the United States and the port of San Francisco, its western terminus. (Tr. p.31.)

During the period involved in the controversy, the defendant in error published and filed with the Interstate Commerce Commission, as required by the Act to Regulate Commerce and the rules of the Commission, its terminal tariffs, providing for the absorption by defendant in error, among other charges, of the State tolls assessed by the Board of State Harbor Commissioners for the port of San Francisco, on shipments originating or delivered at wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Belt Line Railroad, "on all competitive traffic" originating at or destined to Oriental ports, in cases where the Western Pacific Railroad Company "receives the line haul". The express provisions of these terminal tariffs, providing for the absorption of the State tolls, by

defendant in error, are set forth in full at pages 32, 33 and 34 of the transcript.

During the years 1911, 1912, 1913, 1914 and 1915 plaintiff in error transported specified shipments routed over the line of defendant in error between the port of San Francisco and Oriental ports, said shipments being received from or delivered to Piers 42 or 44, and all of such traffic being "competitive traffic" as defined by the terminal tariffs of defendant in error. (Tr. pp. 31-35.)

Plaintiff in error, in compliance with the rules of the Board of State Harbor Commissioners for the port of San Francisco, paid the State tolls on said shipments received from and delivered to Piers 42 and 44, for and on account of the defendant in error, with the knowledge of defendant in error, and "according to the general custom then existing at said port of San Francisco", these charges for State tolls amounting to $2,069.25.

Plaintiff in error also paid the freight for defendant in error on 30 packages carried by plaintiff in error and delivered to defendant in error, making $2,108.38 paid by plaintiff in error for and on behalf of defendant in error and with the knowledge of defendant in error. (Tr. pp. 35, 36.)

Plaintiff in error collected $7,341.46 on certain shipments originating at Manila, which were transported from that port to San Francisco by plaintiff in error, and there delivered to defendant in error, this amount representing the freight accruing on

such shipments to defendant in error for transporting such shipments from the port of San Francisco to their final eastern destinations; and plaintiff in error retained out of the amount so collected the sum of $2,069.25, representing the amount of State tolls which defendant in error under its terminal tariffs agreed to absorb and which had been paid by plaintiff in error to the State Board of Harbor Commissioners for the port of San Francisco for the use and benefit of defendant in error, and also retained freight charges of $39.13, a total of $2,108.38.

Plaintiff in error tendered and offered to defendant in error the balance and remainder of the $7,341.46, or the sum of $5,233.08, and plaintiff in error has at all times held itself ready, willing and able to pay this amount to defendant in error, without prejudice to any rights of defendant in error to insist upon its claim of $2,108.38, and "with the absolute right of the plaintiff (defendant in error) to use and apply said $5,233.08 to its own use, as it should see fit, and without any right or claim by defendant (plaintiff in error) on or to said $5,233.08, or for repayment thereof". (Tr. pp. 36, 37, 38.)

All of these import and export shipments were received from and delivered to defendant in error by plaintiff in error at Piers 42 and 44, and at the wharves served by the Southern Pacific Company, The Atchison, Topeka & Santa Fe Railway Company and the Belt Line Railroad, as specified in the terminal tariffs of defendant in error, "at which

and upon which cargo as agreed and stated by plaintiff (defendant in error) * * * in the said tariffs, plaintiff (defendant in error) * * * 'also will absorb State tolls' * * *"; and that the State tolls paid by plaintiff in error for and on behalf of defendant in error were the State tolls "which under and as stated in said terminal tariffs were to be charged to and absorbed by plaintiff (defendant in error) * * * as and for a part and portion of its proportion of said through rate", as provided in its terminal tariffs. (Tr. pp. 38, 39.)

The Law Applicable to the Case.

JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

The Western Pacific Railroad Company, the defendant in error, is concededly subject to the jurisdiction of the Interstate Commerce Commission, and embraced within the Commission's jurisdiction are the rates charged for main line hauls on all shipments transported by the Western Pacific to and from the port of San Francisco which, as in the case of the shipments in question, were in transit to or from foreign ports, and also "all services in connection with the receipt, delivery, * * * transfer in transit, and handling of property transported".

> *Act to Regulate Commerce*, approved February 4, 1887, 24 Statutes at Large 379; as amended by an Act approved March 2, 1889, 25 Statutes at Large, 855; by an Act approved

February 10, 1891, 26 Statutes at Large, 743; by an Act approved February 8, 1895, 28 Statutes at Large, 643; by an Act approved June 29, 1906, 34 Statutes at Large, 584; by a joint resolution approved June 30, 1906, 34 Statutes at Large, 838; by an Act approved April 13, 1908, 35 Statutes at Large, 60; by an Act approved February 25, 1909, 35 Statutes at Large, 648; by an Act approved June 18, 1910, 36 Statutes at Large, 539; by an Act approved August 24, 1912, 37 Statutes at Large, 566; by an Act Approved March 1, 1913, 37 Statutes at Large, 701; by an Act approved March 4, 1915, 38 Statutes at Large, 1197; by an Act approved August 9, 1916, 39 Statutes at Large, 441; and by an Act approved August 29, 1916, 39 Statutes at Large, 556.

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

R. R. Comm. of Ohio v. Worthington, etc., et al., 225 U. S. 101;

T. & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111.

Under the provisions of Section 6 of the Act to Regulate Commerce, as amended, every common carrier subject to the Act to Regulate Commerce is required to file with the Interstate Commerce Commission schedules showing rates and charges for transportation between points on its line and points on the lines of its connecting carriers, and also to "state separately all terminal charges * * * all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fare and charges, or the value of

the services rendered to the passenger, shipper or consignee * * *".

Under the provisions of the Interstate Commerce Act, terminal charges must be published separately.

Stickney v. I. C. C., 164 Fed. 638; Affirmed, 215 U. S. 98.

It has been held by the Supreme Court of the United States that a published tariff, so long as it is in force, has the effect of a statute and is binding alike on the carrier and the shipper.

Pa. R. R. Co. v. International Coal Mining Co., 230 U. S. 184;
Dayton Coal & Iron Co. Ltd. v. C. N. O. & T. P. R. Co., 239 U. S. 446

It has been held by the Interstate Commerce Commission and by the Supreme Court of the United States that the Congress has not confided to the Interstate Commerce Commission any jurisdiction over the ocean carriage of through shipments moving by rail between interior points in the United States and ports in connection with the steamer haul from the port to non-adjacent foreign country.

Cosmopolitan Shipping Co. v. Hamburg-American Packet Line, 13 I. C. C. 266;
Armour Packing Co. v. U. S. 209 U. S. 56.

It thus appears that it has been judicially established by the Court of last resort and by the Interstate Commerce Commission, which is charged with the administration of the law, that the Commission has no jurisdiction over the ocean transit on ship-

ments moving via combined rail and steamer haul, but that the Commission has been vested with jurisdiction so far as the inland rail haul is concerned, and that *this jurisdiction,* as has already been shown, *extends not only to the main line rates but to the terminal charges made by the carriers for all services connected with receiving and delivering shipments.*

DEFENDANT IN ERROR AGREED TO ABSORB THE STATE TOLL ASSESSED ON THE SHIPMENTS IN QUESTION.

Pursuant to the authority vested in it by the Act, the Interstate Commerce Commission has promulgated rules relating to the manner in which tariffs must be published and filed, and what charges may be specified and embraced therein, and has incorporated in its published tariff rulings a rule relating to ocean carriers and export and import tariffs, as follows:

> "Ocean carriers between ports of the United States and foreign countries *not adjacent* are not subject to the terms of the Act to regulate commerce; nor to the jurisdiction of the Commission.
>
> (a) The inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares to the ports and from the ports, and such rates or fares must be the same for all, regardless of what ocean carrier may be designated by the shipper or passenger.
>
> (b) As a matter of convenience to the public said carriers may publish in their tariffs such through export or import rates or fares to or

from foreign points as they may make in connection with ocean carriers. Such tariffs must, however, distinctly state the inland rate or fare as above provided, and need not be concurred in by the ocean carrier, because concurrence can be required from, and is effective against, only carriers subject to the Act."

(Regulations of the I. C. C. to govern the construction and filing of freight tariffs, etc., approved February 13, 1911, Rule 71, p. 104.)

We have heretofore set forth the substance of the terminal tariffs published by the defendant in error, providing for the absorption of the State toll assessed on shipments moving over the wharves served by the carriers operating at the port of San Francisco. These tariff provisions provide that the defendant in error will absorb the State toll assessed at such wharves, and in view of the fact that the Interstate Commerce Commission can exercise no jurisdiction with reference to the ocean carriage, it must be held that the purpose for providing for such absorptions in the terminal tariffs was to lawfully permit the *defendant in error* to make the absorptions of the State toll out of the rates received by that carrier for performing the main line haul.

Counsel for defendant in error, in presenting the argument in the District Court in support of the demurrer and motion for judgment on the pleadings, contended that the rules published in the terminal tariffs filed by the Western Pacific Railroad Company, set forth in the second amended answer, were designed to provide for the absorption of

State toll assessed on shipments moving into and out of San Francisco, over the wharves, when transported by the freight barges of that line, and that they did not relate to the absorption of the charges assessed by the Board of State Harbor Commissioners for the port of San Francisco in cases where shipments of export and import freight were handled over the wharves in connection with the steamer line.

If the tariff publications were designed to accomplish this purpose, why did the terminal tariffs filed by the defendant in error not restrict the absorptions of State toll to traffic received by and delivered to its barges at San Francisco, instead of specifying that the "Western Pacific Railroad * * * also will absorb State toll to and from wharves served * * * by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company and the State Belt Railroad Company * * * on all traffic originating at, destined to, or routed via points in Alaska, Australia, China, Hawaiian Islands, Japan, Philippine Islands, New Zealand, South America * * * and north thereof, on the one hand, and on the other hand, originating at or destined to Ogden, Salt Lake City or Garfield, Utah, and points east thereof." (Tr. pp. 31-34.)

It is alleged in the second amended answer that Piers 42 and 44 were served by the rails of the Southern Pacific Company, and that the shipments in question were competitive traffic of the character specified in terminal tariffs filed by the defendant

in error. How then can it be argued that the charges should be absorbed only on traffic moving over the wharves when received by or delivered to the wharves by the barges of the defendant in error? Its barges have at no time served Piers 42 or 44. These piers were and are the piers of the Pacific Mail Steamship Company, and are served by the rails of the Southern Pacific Company and not by the barges of the defendant in error.

It must be held that the facts pleaded in the separate answer conclusively show that the defendant in error agreed to absorb the State toll on the shipments specified therein.

PLAINTIFF IN ERROR PAID THE STATE TOLL ASSESSED ON THE SHIPMENTS IN QUESTION, FOR AND ON BEHALF OF DEFENDANT IN ERROR, WITH ITS KNOWLEDGE, AND IN ACCORDANCE WITH THE CUSTOM OBTAINING AT THE PORT OF SAN FRANCISCO.

It is alleged in paragraph 3 (tr. 35) of the separate answer contained in the second amended answer of plaintiff in error that under the rules of the Board of State Harbor Commissioners for the port of San Francisco, the tolls for the cargo received on board from the defendant in error and delivered on said Piers 42 and 44 from the vessels of plaintiff in error for defendant in error were required to be paid by the vessels of plaintiff in error "receiving and/or discharging such cargo, and accordingly and for the plaintiff (defendant in error) and for the use and benefit of the plaintiff

(defendant in error), the defendant (plaintiff in error) paid the State tolls for plaintiff (defendant in error), with the knowledge of plaintiff (defendant in error) and according to the general custom then existing at the said port of San Francisco, on said import and export cargo of five cents per ton". (Tr. pp. 35, 36.)

By conventional arrangement, the parties provided for interchanging export and import traffic transported over their respective rail and steamer lines, and the custom obtaining at the port where the shipments were thus interchanged is controlling in the absence of a complete express agreement relating to the manner in which the ocean carrier should initially pay the charges assessed for State toll, and for the repayment thereof to the ocean carrier by the rail carrier. The parties are presumed to have contracted with reference to the manner in which these charges should be initially paid and repaid in accordance with the general usage and custom at the port of San Francisco.

> *The F. J. Luckenbach*, 213 Fed. 670;
> *Continental Coal Co. v. Birdsall*, 108 Fed. 882;
> *Steidtmann v. The Joseph Lay Co.*, 234 Ill. 84;
> *C., R. I. & P. Ry. Co. v. Dodson*, 107 Pac. 921.

It therefore appears from the allegations contained in the second amended answer interposed by plaintiff in error that defendant in error provided

in its terminal tariffs to absorb State toll on the shipments specified in the answer; and that in compliance with the rules of the Board of State Harbor Commissioners for the port of San Francisco, plaintiff in error made the initial payment of these charges, with the knowledge of defendant in error and in accordance with the custom obtaining at the port of San Francisco. Therefore, the Court must reach the inevitable conclusion that the charges assessed for State toll were paid by the plaintiff in error for and on behalf of the defendant in error, and that, in accordance with the custom at the port of San Francisco, such charges should have been refunded by defendant in error to plaintiff in error, and that plaintiff in error was legally entitled to withhold the amount paid for State toll for and on behalf of defendant in error, and that the amount of State tolls thus paid by plaintiff in error for and on account of defendant in error, with its knowledge, and in accordance with the custom at the port of San Francisco, is a proper offset against the claim made by the defendant in error in its complaint.

It was argued by counsel for defendant in error in the District Court that the question of the initial payment of the State toll by plaintiff in error for and on account of defendant in error and the liability of defendant in error to repay to the plaintiff in error the amount of State toll so paid by plaintiff in error were questions between the parties litigant, with which shippers had no concern, and were

questions in which the Interstate Commerce Commission was not interested, and concerning which the rules of the Interstate Commerce Commission did not apply.

The Act to Regulate Commerce itself, the authorities, and the Commission's rules, to which reference has hereinbefore been made, disclose how carefully Congress, and the Commission charged with the proper administration of the Act to Regulate Commerce, have sought to disassociate and distinguish the rail and ocean carriage of shipments involving a combined rail and ocean haul; and moreover, the Act requires the carriers within the jurisdiction of the Commission, in addition to publishing and filing tariffs relating to rates covering the main line haul, to separately publish and file tariffs showing terminal charges and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee". (Sec. 6, supra.)

In compliance with this provision of the statute, the defendant in error published in its terminal tariffs the fact that it would absorb the charges assessed for State toll on competitive traffic upon which it received the line haul, destined to or received at wharves served by the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, and the State Belt Railroad, and

the rate of the ocean carrier was stated in its main line tariffs.

If these absorptions had not been published, the shippers would have been informed that they were obliged to pay:

1st. The main line rate;

2nd. The switching charge;

3rd. The State Belt toll; and

4th. The rate of the ocean carrier.

But for competitive reasons the defendant in error undertook to absorb the switching charge and the State toll, in order to place the port of San Francisco on a parity with other Pacific Coast ports, and in order to make the aggregate rail charge for the inland proportion of the haul commensurate with the charges paid by the shippers who might route their shipments through other Pacific Coast ports.

The primary object sought to be accomplished by the Act to Regulate Commerce is to prevent discrimination.

> *Armour Packing Co. v. U. S.*, supra;
> *Kansas City So. Ry. Co. v Carl,* 227 U S. 639;
> *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662;
> *G. F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190.

In order to accomplish this purpose, the Commission has been vested with power to require the carriers to keep their accounts in compliance with

uniform rules promulgated by the Commission as provided by Section 20 of the Act to Regulate Commerce. In compliance with this section, it is incumbent upon the defendant in error to account to the Commission as required by Section 20 and the rules promulgated by the Commission for all absorptions of whatever kind, character or description.

It is further incumbent upon the defendant in error to comply literally with the provisions of its tariffs filed with the Commission. As has been shown, such tariffs when filed have all the force of law.

> *Pa. R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184;
> *Dayton Iron Co. v. C. N. O. & T. R. Co.*, 239 U. S. 446, 449.

Having voluntarily agreed to make the absorption of the State toll, the defendant in error is obliged in fact to make such absorption, and account therefor. By Conference Ruling No. 7, promulgated by the Commission in its Conference Rulings Bulletin No. 7, page 123, it is provided:

> "The absorption of drayage charges being under consideration, the Commission holds:
>
> (a) Where there is an additional transfer or drayage charge in connection with a through shipment, the carriers' tariffs must specify what that charge will be.
>
> (b) If such drayage or transfer charge is absorbed, in whole or in part, by a carrier, the tariffs must show the amount of such transfer charge that will be absorbed.

> (c) A drayage firm is not a proper party to a joint tariff nor is it a carrier under the provisions of our act; therefore, no tariffs can properly be filed by it."

Reasoning by analogy, the absorption of the State toll, which is an additional charge in connection with a through shipment, the tariffs of the carriers subject to the jurisdiction of the Commission, in order to absorb such charge, must show the amount of the charge thus absorbed, and the connecting carrier which is not subject to the jurisdiction of the Commission cannot file such tariffs. The principle announced by the Commission should be applied here, and the absorption published in the tariffs of the rail carrier should be, as they were intended to be, absorbed by the rail carrier. The voluntary assumption of the obligation to make this absorption cannot be satisfied by the ocean carrier making such absorption out of its own rates.

It cannot therefore be successfully contended that this is a question in which the shippers or the Commission have no concern or interest.

To permit the defendant in error to depart from its tariffs would enable the defendant in error to open wide the door to discrimination by making absorptions in one case for certain shippers, and declining to make absorptions in other cases for other shippers, and would do violence to the plain provisions of the statute.

It is submitted that the separate answer contained in the second amended answer interposed by plain-

tiff in error contains sufficient allegations to constitute an answer to the complaint and an offset thereto, because it avers:

> That defendant in error voluntarily agreed to absorb State tolls on the shipments specified in the answer;
>
> That the defendant in error provided for making these absorptions out of its revenues derived from the main line haul on these shipments;
>
> That the plaintiff in error made initial payment of the amounts assessed by way of State toll, for and on behalf of the defendant in error, with its knowledge, and in accordance with the custom obtaining at the port of San Francisco; and further,
>
> That to permit defendant in error to retain the amount of the absorptions which it obligated itself to make would violate the provisions of the Act to Regulate Commerce, and cause plaintiff in error to abate from its charges the rates which it lawfully earned, and compel plaintiff in error to assume a loss of revenue which loss had voluntarily been assumed by defendant in error.

INTEREST SHOULD NOT HAVE BEEN ALLOWED.

In view of the tenders and offers of payment alleged in the Answer and Separate Answer, it was error to allow interest to defendant in error,

especially upon the amount tendered and offered to be paid to defendant in error.

The judgment of the District Court should be reversed.

Dated, San Francisco,
February 18, 1918.

Respectfully submitted,

KNIGHT & HEGGERTY,
CHARLES J. HEGGERTY,
Attorneys for Plaintiff in Error.

C. W. DURBROW,
Of Counsel.

No. 3109

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

3

PACIFIC MAIL STEAMSHIP COMPANY (a corporation),

Plaintiff in Error,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

A. R. BALDWIN,
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Attorneys for Defendant in Error.

Filed this..................................day of March, 1918.

FRANK D. MONCKTON, Clerk.

By.., Deputy Clerk.

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BRIEF FOR DEFENDANT IN ERROR

Statement of the Case.

The statement of the case contained in the brief for plaintiff in error requires little by way of amendment or qualification. The nature of the action, the amount sought to be recovered, the rulings of the District Court upon the demurrers interposed to the original, first amended and second amended answers, and the order for the entry of judgment upon the pleadings are alike properly set forth. However, a correction must be made in that portion

of the statement purporting to set forth the averments of the seconded amended answer respecting the rules of the Board of State Harbor Commissioners as to the payment of State Tolls. This portion of the statement reads as follows:

> "and that under the rules of the Board of State Harbor Commissioners of the port of San Francisco plaintiff was required to *initially* pay the charges assessed for State toll;" (Brief for Plaintiff in Error, page 3.)

We have italicized the word "initially" in this excerpt because it is not found in the text of the answer. The literal phrasing of the clause in the answer is as follows:

> "that under the rules of the Board of State Harbor Commissioners for the port of San Francisco, the tolls for said cargo received on board from plaintiff and delivered on said piers 42 and 44, from the vessels of defendant for the plaintiff and for said Receivers, were required to be paid by the vessels of defendant receiving and/or discharging such cargo," (Tr. p. 35.)

The interpolation of the word "initially" in the statement of the case prepared by the plaintiff in error may conceivably mislead, and for that reason attention is directed to the error. It was and is the contention of the defendant in error that the obligation to pay the tolls assessed against the vessels of the plaintiff in error rests with the plaintiff in er-

ror, not *initially* merely but *finally*. In virtue of this contention there should be no misapprehension as to the state of the record.

With the exception above noted, the statement of the case offered by the plaintiff in error does not require controversion.

ARGUMENT

The Issues.

The issues presented by the writ of error herein are narrow and free from complication. The assignment of errors presents, in varying form, the exception of the plaintiff in error to the ruling of the District Court that the second amended answer fails to state facts sufficient to constitute a counterclaim. The primary issue, therefore, is the validity of the alleged counterclaim. The propriety of the award of interest is a subsidiary issue, determinable by the ruling upon the major issue.

Preliminary Legal Principles.

We are in essential accord with counsel for plaintiff in error respecting certain preliminary legal principles. That the defendant in error, as a carrier subject to the Act to Regulate Commerce, must file its tariffs with the Interstate Commerce Commission; that the provisions of its terminal and other

tariffs, filed pursuant to the requirements of the Act, have the force of law and must be strictly observed; and that the Interstate Commerce Commission has no jurisdiction over the ocean carriage of export and import traffic destined to or coming from non-adjacent foreign countries, are elemental. But we are sharply in opposition respecting the results flowing from these principles. We submit with confidence that their recognition and application in this case can lead to but one conclusion, and that unfavorable to the contentions of the plaintiff in error.

The Tariffs of a Rail Carrier Providing That It "Will Absorb State Toll" on Export and Import Traffic Relate to That Toll Which Accrues in Connection with the Rail Haul and Do Not Comprehend the Toll Which Accrues in Connection with the Service of a Connecting Ocean Carrier.

This conclusion is necessitated by the limits of jurisdiction fixed by the Act to Regulate Commerce, which find clear recognition in the brief of plaintiff in error. The text of Section VI of the Act to Regulate Commerce, which embodies the requirement of tariff publication, may profitably be consulted in this behalf. The first paragraph of the section reads as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all

the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.*"

We have italicized the final sentence of the paragraph because it states in terms of the clearest character that the tariffs which must be published and

filed relate only to the "traffic, transportation, and facilities defined in this Act." This necessarily excludes the traffic, transportation, and facilities of ocean carriers engaged in transportation to non-adjacent foreign countries, because concededly they are not defined or included in the Act. The jurisdiction of the Interstate Commerce Commission, as defined in the Act, extends only to the interior haul to and from the seaboard. In *Cosmopolitan Shipping Company* vs. *Hamburg-American Packet Company,* 13 I. C. C. 266, the Interstate Commerce Commission held that the rail carriers must publish as separately established rates the inland proportions of the rates applicable to traffic destined to or coming from points in non-adjacent foreign countries. This conclusion was forced by the absence of authority over the water carriers. The Commission says upon this point:

> "The Commission, not having been given control over the ocean carriers, cannot compel observance of the law by such carriers, and if they so choose they may alter their rates at such times as they please or for such patrons as they please. *Therefore the line must be drawn decisively between those carriers whose rates and practices this Commission can control and those which it cannot control;* and upon this line of reasoning it has been the consistent ruling of the Commission that 'joint rates' cannot be made between carriers subject to the act and those not subject to the act.

> The Federal Government has said that this Commission shall exercise jurisdiction over the inland portion of the haul, either to or from the foreign country; and it must logically and necessarily follow that the rate which must be filed with the Commission under Section 6 of the act is the rate governing such movement."

Again, in *Chamber of Commerce of New York* vs. *New York Central and Hudson River Railroad Company,* 24 I. C. C. 55, 74, the Commission said:

> "We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways. This does not mean that the carriers may not take into consideration the previous or further transportation of the traffic on the ocean and thus differentiate it, reasonably, from domestic traffic, but the rates to and from the ports must be reasonable, *must be published as independent from the ocean transportation,* and are subject to all of the provisions of the act."

See also *Aransas Pass Channel & Dock Company* vs. *G. H. & S. A. Ry. Co., et al.,* 27 I. C. C. 403, 414; *Louisiana Sugar Planters' Association* vs. *Illinois Central Railroad Company, et al.,* 31 I. C. C. 311, 319.

These limitations upon the jurisdiction of the Commission, we have stated, are conceded by counsel for the plaintiff in error, but they fail to find recognition in his argument. If it be true, as the Commission says in the Cosmopolitan Shipping

Company case, *supra,* that "the line must be drawn decisively between those carriers whose rates and practices this Commission can control and those which it cannot control," it follows that the tariff of the rail carrier can not be construed to cover any charge or service of a connecting ocean carrier. If it be true, as the Commission says in the Chamber of Commerce case, *supra,* that the rail rates to and from the ports "must be published as independent from the ocean transportation," *it follows that the tariffs of the rail carrier, published as independent from the ocean transportation, comprehend nothing within the field of ocean transportation.* If the tariff of the rail carrier were so construed as to comprehend any feature of the ocean service, it could not be said that the line had been drawn decisively, or that rates had been published as independent from the ocean transportation, as the Act and the rulings of the Commission alike require.

We reproduce from the brief for plaintiff in error a portion of Rule 71 of the Interstate Commerce Commission's Tariff Circular 18-A, italicizing, for the sake of emphasis, a clause of Subdivision (b):

> "Ocean carriers between ports of the United States and foreign countries not adjacent are not subject to the terms of the Act to regulate commerce; nor to the jurisdiction of the Commission.

(a). The inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares *to the ports and from the ports,* and such rates or fares must be the same for all, regardless of what ocean carrier may be designated by the shipper or passenger.

(b). As a matter of convenience to the public said carriers may publish in their tariffs such through export or import rates or fares to or from foreign points as they may make in connection with ocean carriers. *Such tariffs must, however, distinctly state the inland rate or fare as above provided;* and need not be concurred in by the ocean carrier, because concurrence can be required from, and is effective against, only carriers subject to the Act."

Subdivision (d) of the same paragraph is likewise pertinent. The text is as follows:

"(d). Export and import traffic may be forwarded under through billing, but such through billing must clearly separate the liability of the inland carrier or carriers and of the ocean carrier, and must show the tariff rate of the inland carrier or carriers."

Again we submit that if the tariffs of the rail carrier must *distinctly state the inland rate or fare*—if the bill of lading *must clearly separate the liability of the inland carrier or carriers and of the ocean carrier*—then it follows that the tariff of the rail carrier relates to its own field of service, and can not be held to reach beyond into the field of service

of the ocean carrier in nowise amenable to the Act. In fine, the service, the liability and the tariffs of the rail carrier reach their limit at the point of interchange with the water carrier—in shipping parlance, at ship's tackle. They do not comprehend any portion of the service, the liability or the obligations of the water carrier.

For the sake of concreteness an illustrative case may be presented. A shipment is carried by rail from Chicago to San Francisco destined for ocean movement to an Oriental point. Upon arrival at Oakland it may be transferred by means of the rail carrier's barge to San Francisco, the entry being made over a state wharf. A State Toll is assessed for this privilege and paid by the carrier. The shipment is then delivered to a connecting rail carrier to be switched to the wharf at which the steamer is berthed. A switching charge accrues for this service. The shipment is then placed upon the wharf—at ship's tackle. Delivery to the ocean carrier is now complete. The shipment is then taken on board by the ocean carrier. A toll accrues against the vessel for its use of the wharf and is paid by the ocean carrier.

The nature and office of the rail carrier's terminal tariff may now be considered. Its purpose is to apprise the shipper and receiver of freight of all services, charges and privileges of a local character, not

normally to be found in the tariffs carrying the main line rates. Accordingly, the defendant in error herein provides in its terminal tariffs that it will absorb the switching charges of connecting rail carriers, and also that it will absorb State Toll (Tr. pages 33-34). In brief, the shipper is informed that the main line rate is a net rate, carrying the shipment without additional charge to the point of delivery to the connecting ocean carrier. Both of the charges which the rail carrier assumes to this end accrue within its own field of service.

On page 17 of the brief for plaintiff in error is found a purported quotation from the terminal tariffs of defendant in error, with indicated omissions. But this purported quotation is the product of a complete transposition of the language of the tariff, with the result that a wholly misleading impression is created. The text is not susceptible of this inversion. By reference to the text of the items, it will appear that the carrier agrees, first, to absorb the switching charge of the connecting rail carrier, and, second, to absorb State Toll. The switching charge which it assumes is that which accrues within its fields of operation—for the delivery service of the connecting rail line which it makes its own. The State Toll stands in similar case. Both are incident to the rail haul; both are within the Act to Regulate Commerce. The characterization

of traffic embodied in the item is a characterization merely. The item does not state, directly or by implication, that the State Toll assessed against the vessel of the water carrier after the completion of the rail carrier's service—beyond the limits of the Act to Regulate Commerce—will be assumed.

We take from Page 22 of the brief for plaintiff in error a tabulation of charges which, it is stated, the shippers would have been informed that they were obligated to pay had the absorptions not be published:

"1st. The main line rate;

2nd. The switching charge;

3rd. The State Belt toll; and

4th. The rate of the ocean carrier."

An important item has been omitted. We venture to amend to read as follows:

1st. The main line rate;

2nd. The switching charge;

3rd. The State Toll assessed against the rail carrier;

4th. The State Toll assessed against the ocean carrier; and

5th. The rate of the ocean carrier.

The flaw in the tabulation prepared by plaintiff in error is represented by the failure to include the two tolls—one accruing as an incident to the rail service and the other as an incident to the water service.

At the risk of prolixity, we repeat that the effect of the terminal tariff is to inform the shipper that the main line rate is a net rate so far as the service of the rail carrier is concerned. It includes the State Toll accruing in the course of rail service; it includes the switching charge of the connecting rail carrier, and, therefore, carries the freight to the point of delivery upon the wharf at ship's tackle. But, it can not be warped into an undertaking to go beyond ship's tackle into the service of the ocean carrier and absorb a *second State Toll* which accrues against the vessel itself for its use of the State wharf. Herein lies the error in the contentions of the plaintiff in error.

The analogy which the plaintiff in error seeks to draw between the tolls here in controversy and drayage charges is singularly imperfect. Conference Ruling No. 441 of the Interstate Commerce Commission, reproduced upon pages 23 and 24 of brief for plaintiff in error, relates to "a transfer or drayage

charge in connection with a through shipment," *i. e.*, a charge for a transfer service which the carrier makes its own, as, for example, between the stations of connecting rail carriers. But the rail carrier could not make its own the service of an ocean carrier engaged in transportation to a non-adjacent foreign country. It could not absorb the trans-oceanic charge of the ocean carrier, because beyond the scope of the Act. For the same reason it could not assume any other charge of the ocean carrier, even though it be local in character, because beyond the scope of the Act.

We again submit that the defendant in error has not, in fact, assumed the burden of these ocean tolls, because the tariff excludes the service and obligations of the ocean carrier and relates only to the service and obligations which are within the Act.

A Carrier's Tariff Does Not Govern Its Relations with Connecting Carriers; It Applies Solely to the Relations Between the Carrier and Its Patrons.

The purpose of the Act in requiring the publication of tariffs by carriers subject to its provisions was to enable shippers to inform themselves with respect to the rates which they must pay and the service which the carrier must afford. (*United States* vs. *Chicago & Alton Railway Company,* 148 Fed. 646; *Chicago & Alton Railway Company* vs.

United States, 156 Fed. 558; *Newton Gum Company* vs. *Chicago, Burlington & Quincy Railroad Company,* 16 I. C. C. 341.)

The carrier's tariffs speak to the shipper and not to a connecting carrier. Relations between connecting carriers are not normally embodied in tariffs; on the contrary relations between carriers *inter se* are set forth in traffic contracts and division sheets. As the Commission well said in *Cosmopolitan Shipping Company* vs. *Hamburg-American Packet Company, supra*:

> "But as to such carriers (*i. e.* ocean carriers) engaged in foreign business, the rail carrier has, so far as this law is concerned, a purely contractual or proprietary relation, *not a relation regulated or controlled in any manner by this act.*

The provisions of the tariffs of rail carriers reciting that State Tolls at San Francisco will be absorbed were designed to inform shippers that the rail carriers would assume the toll exacted by the State for the movement of freight over state wharves in connection with the rail haul, thereby relieving the shippers of that burden. The tariffs were obviously not designed to advise the ocean carriers that they would be reimbursed by the rail carriers in the amount of tolls paid by the water carriers to the State in connection with the water service. The rail carrier has no part or interest in the service or obli-

gations of the water carrier. There could be no possible motive on the rail carriers' part to relieve the water carriers of a burden resting upon them. Accordingly, this defendant may not competently invoke the tariff rule for the purpose of imposing upon the rail carrier a double burden of State Tolls comprehending the tolls assessed in connection with the rail and water service alike.

We are under the necessity of pointing out that counsel for the plaintiff in error has misconceived our contention in the District Court. We have not intimated that the question is one in which neither the Commission nor shippers have an interest; we have not suggested that a carrier subject to the Act may disregard its tariffs. We have contended only, as we contend now, that the tariff speaks to the shipper—not to a connecting water carrier. The rail carrier makes no agreement with a connecting ocean carrier by virtue of its terminal tariff; such agreement as it makes is with consignors and consignees—it is for them that the tariff is published—it is to them that the tariff speaks, and it speaks to them only respecting matters comprehended within the rail carrier's field of service—a field of service marked by bounds clearly set by the Act to Regulate Commerce. We insist, therefore, that the ocean carrier, which is the plaintiff in error in this case, may not competently invoke the terminal tariffs of the rail carrier, which is the defendant in error here-

in, for the purpose of shifting to the rail carrier a burden which rightfully rests upon the ocean carrier itself.

Defendant in Error Did Not Agree to Absorb the State Tolls Assessed Against the Vessels of the Plaintiff in Error Respecting the Shipments in Question.

The alleged "agreement" is sought to be found in the terminal tariffs of defendant in error, but we think it is clear from the foregoing argument that defendant in error did not, by virtue of its published tariffs or otherwise, agree to assume the State Tolls assessed against the vessels of the plaintiff in error. It is significant that there is no averment of an *agreement* in the Second Amended Answer. The fluctuations in the text of the pleadings of the plaintiff in error are not without significance. The original answer alleges no agreement (Tr. pages 8-16). By its First Amended Answer, plaintiff in error sought to set up an agreement "on information and belief" (Tr. pages 22-24). The demurrer interposed by the defendant in error to this pleading was confessed by the plaintiff in error in open Court (Tr. page 29). The Second Amended Answer is discreetly silent as to any alleged contractual undertaking. (Tr. p. 29-39.) The averment in Paragraph VII of the separate answer embodied in the second amended answer (Tr. p. 39) that the tolls paid were those contemplated by the terminal tariffs of the defendant in error, is a mere conclusion of

law, and is expressly negatived by the averment in Paragraph III of the same answer which sets forth that the tolls paid "were required to be paid by the vessels of defendant (plaintiff in error) receiving and/or discharging such cargo." (Tr. page 35.) Accordingly, the contention that the defendant in error had agreed to assume the tolls here in controversy is not only without support of record, but is overthrown by the answer itself.

The State Tolls Paid by the Plaintiff in Error Were Not Paid for or on Behalf of Defendant in Error.

The averment to the contrary effect again represents a mere conclusion, founded upon the same attempted projection of the rail carrier's tariffs into the field of ocean transportation. It is not even alleged that payment was made upon the request or at the instance of the defendant in error. (27 Cyc. 843.) We repeat that the contention is negatived by the averment in Paragraph III of the Second Amended Answer, which clearly shows that the tolls paid were those assessed against the vessels, and not those which accrued in the course of rail service. (Tr. page 35.)

The attempt to rely upon custom is singularly strained. The custom so haltingly averred relates to the circumstances of the alleged payment for and in behalf of the defendant in error, and fails with the

failure of the remainder of the averment. We may observe, however, that resort may be had to custom to explain a written contract only when ambiguity exists. This is axiomatic and is supported by the authorities cited in the brief for plaintiff in error. No written contract is alleged, and no ambiguity appears elsewhere, since the limitations of the tariff published by a rail carrier subject to the Act are clearly fixed by law. Resort to alleged custom, therefore, can not assist the case of plaintiff in error.

Interest Was Properly Allowed.

It is well settled that a tender of the payment of a part of an indebtedness will not suffice to stop the running of interest upon the entire sum or any portion thereof.

> 22 Cyc. 1557;
>
> *Lilienthal* vs. *McCormick* (9th C. C. A.), 117 Fed. 89;
>
> *Donaldson* vs. *Severn River Glass Co.*, 138 Fed. 691.

Since the tender pleaded was but partial, the District Court properly allowed interest upon the principal sum recovered.

It is respectfully submitted, therefore,

1st. That the provisions of the Act to Regulate Commerce and the tariffs published by rail carriers

responsive to its requirements do not cover any portion of the service of a connecting ocean carrier, engaged in transportation to points in non-adjacent foreign countries.

2nd. That the tariffs of a rail carrier providing that it will absorb State Toll on export and import traffic relate to that toll which accrues in connection with the rail haul and do not comprehend the toll which accrues in connection with the service of a connecting ocean carrier.

3rd. That a carrier's tariff does not govern its relations with connecting carriers, but applies solely to the relations between the carrier and its patrons.

4th. That defendant in error did not agree to absorb the State Tolls assessed against the vessels of the plaintiff in error respecting the shipments in question.

5th. That the State Tolls paid by the plaintiff in error were not paid for or on behalf of defendant in error.

6th. That interest was properly allowed.

It is submitted that the order of the District Court should be affirmed.

Respectfully submitted,

A. R. Baldwin,

Allan P. Matthew,

Attorneys for Defendant in Error.

3110

No.______________

United States
Circuit Court of Appeals
For the Ninth Circuit.

I. F. SEARLE, MINNIE A. GIBBS and MERRILL COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellants

vs.

MECHANICS LOAN & TRUST COMPANY and EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellees.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, a Corporation,

Bankrupt.

Transcript of the Record

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Upon Appeal from the United States District Court for the District of Idaho, Northern Division

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In the District Court of the United States for the District of Idaho, Northern Division.

IN THE MATTER OF THE STACK-GIBBS LUMBER COMPANY, a Corporation,

Bankrupt.

No. 905

AMENDED PROOF OF CLAIM OF MECHANICS LOAN AND TRUST COMPANY, A CORPORATION

At Spokane, Washington, in the County of Spokane, on the 5th day of January, A. D. 1917, came J. V. Rea, of Spokane, Washington, and made oath and says that he is the manager and secretary of the Mechanics Loan & Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and having its principal place of business at Spokane, Washington; that he is duly authorized by said corporation to make this proof of claim in the above entitled cause and court for and on behalf of said Mechanics Loan & Trust Company, the said corporation having no treasurer, and affiant occupying the position most nearly like that of treasurer with said corporation.

Affiant further says that the Stack-Gibbs Lumber Company, a corporation, against which a petition for adjudication of bankruptcy was filed in the above entitled court and cause on July 29, 1916, was at and before the filing of said petition, and still is, justly and truly indebted to this corporation in the sum of $101,162.91. The consideration for said debt is as follows: That on or about February 1, 1916,

the said Stack-Gibbs Lumber Company, a corporation, was operating the lumber mill at Gibbs, Idaho, and was also engaged in the business of logging and manufacturing of lumber and allied products, and other business relating thereto. That it was represented that the said lumber company and also the Dryad Lumber Company, a corporation, by C. D. Gibbs, an officer and trustee of each corporation at said time, that the assets of the said companies greatly exceeded the indebtedness but that they were unable to obtain means to pay the indebtedness due and presently to become due, and it was agreed by the said Stack-Gibbs Lumber Company, a corporation, the Dryad Lumber Company, a corporation, C. D. Gibbs and Mechanics Loan & Trust Company, a corporation, that a plan be adopted for realizing upon the property of the lumber company and the mill company and securing money to pay their presently due indebtedness and for satisfying their indebtedness, and the said parties entered into the agreement which is hereto attached and made a part of this proof of claim, marked "Exhibit A," and the said agreement was also signed by Merrill, Cox & Company, a corporation, Fort Dearborn National Bank, a corporation, I. F. Searle, First National Bank of Lincoln, Nebraska, a corporation, Exchange National Bank of Spokane, a corporation, Shoshone Lumber Company, a corporation, Idaho Timber Company, a corporation, S. H. Hess, J. K. Stack, Genevieve Hess Tolerton and Mrs. M. A. Gibbs, all of said parties consenting to and acquiescing in the plan outlined in said agreement mentioned above.

It was provided in said instrument, in paragraph 2 thereof of the conditions, that the Mechanics Loan & Trust Company, as trustee, might in its discretion but should not be required to carry on the whole or any part of said business theretofore conducted by said lumber company and said mill company.

It was further provided in Section 10 of said conditions set forth in said Exhibit A that the trustee namely, the Mechanics Loan & Trust Company, a corporation, should advance such sums of money as it should deem necessary to meet the then present payroll of the lumber company and the mill company and to discharge the claims of creditors who did not execute the instrument, as it was deemed necessary and requisite to protect the trust company, not to exceed the sum of $100,000, and that the trustee, namely, the Mechanics Loan & Trust Company, a corporation, should have a first and preference claim upon said trust estate for the amount of such advancements, and the same should be repaid to it out of the first proceeds of sale of the trust property or any part thereof or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the date of such advancements at the rate of 6% per annum.

It was further provided in said instrument marked "Exhibit A" that the proceeds of the trust estate, after reimbursing the trustee for advancements, expenses, compensation and other claims mentioned therein, should be distributed pro rata among the creditors of the lumber company and the mill company.

Pursuant to said plan and agreement, between the dates of February 9, 1916, and May 11, 1916, the said Mechanics Loan & Trust Company, a corporation, did advance to the said Stack-Gibbs Lumber Company, a corporation, for the purposes set forth in said instrument marked "Exhibit A" hereto attached, the sum of $100,000, which amount was evidenced by notes executed by the Stack-Gibbs Lumber Company, a corporation, and made payable to the order of the Mechanics Loan & Trust Company, a corporation, which said notes and each of them drew interest at the rate of 6% per annum from date and were made payable ninety days after date; that as the said notes became due they were not paid but were renewed by the Stack-Gibbs Lumber Company, a corporation, a list of which said renewal notes is as follows:

8 notes for $5,000 each, dated May 9, 1916, due 90 days after date, with interest on each of said notes from May 9, 1916, to date of filing the petition, amounting to $67.51, which notes are hereto attached and made a part hereof, marked Exhibits "B" to "I" inclusive.

1 note for $2,500, dated May 11, 1916, with interest thereon from date until July 29, 1916, amounting to $32.93, which note is hereto attached and made a part hereof, marked Exhibit "J."

2 notes for $2,500 each, dated May 11, 1916, payable to the Exchange National Bank of Spokane on demand, which notes are hereto attached and made a part hereof, marked Exhibits "K"

and "L", and which said notes were given by the said Stack-Gibbs Lumber Company to take the place and stead of notes for the same amounts made payable to the Mechanics Loan & Trust Company, the said original notes being placed in the hands of the Exchange National Bank of Spokane for the purpose of collection, and through inadvertence and mistake the said bank took the renewal notes on the bank's form of promissory notes and each of said notes was endorsed by the Mechanics Loan & Trust Company.

4 notes for $5,000 each, dated May 16, 1916, payable 90 days after date, which notes are hereto attached and made a part hereof, marked Exhibits "M" to "P" inclusive, and said notes being made out on the form of note running to the Exchange National Bank of Spokane. These notes were renewals of notes running to the Mechanics Loan & Trust Company which had been placed in the hands of the Exchange National Bank of Spokane for the purpose of collection, and said renewal notes were inadvertently made out on the form of note running to the Exchange National Bank of Spokane, and each of said notes was endorsed by the Mechanics Loan & Trust Company.

1 note for $5,000, dated May 24, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "Q".

1 note for $5,000, dated May 26, 1916, payable

90 days after date, which is hereto attached and made a part hereof, marked Exhibit "R".

1 note for $5,000, dated June 5, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "S".

1 note for $5,000, dated June 6, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "T".

1 note for $5,000, dated June 8, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "U".

1 note for $2,500, dated June 13, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "V".

1 note for $5,000, dated July 7, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "W".

That each of said notes drew interest at the rate of 6% per annum from their respective dates, and the total amount of interest due on the total number of notes herein mentioned, on July 29, 1916, was $1162.91, making a total amount due and payable to the said Mechanics Loan & Trust Company on account of money advanced as aforesaid in the sum of $101,162.91, which amount remains unpaid and due. That no part of said debt has been paid and there are no set-offs or counter-claims to the same. That the Mechanics Loan & Trust Company, a corporation, has not, nor has any one by its order, to its knowledge or belief, had or received any manner of security for said debt whatever, except as herein set forth,

and in addition to what has been mentioned heretofore. Those notes marked Exhibits "B" to "I" inclusive are endorsed by C. D. Gibbs, and those notes marked Exhibits "S", "T" and "U" are endorsed by the said C. D. Gibbs. That no judgment has been rendered on said claim.

Claimant further alleges that but for the agreement entered into as hereinbefore stated and as evidenced by a written contract hereto attached and marked "Exhibit A" as a part of this claim, and the signing of the same by the persons and corporations mentioned herein, claimant would not have advanced the said sum of $100,000, upon which, with interest, this claim is based, and claimant claims a lien on all of the property of every kind and character belonging to the said Stack-Gibbs Lumber Company, a corporation, as set forth in contract "Exhibit A," or in lieu thereof, the money now in the hands of the Trustee in Bankruptcy which was derived from the sale of any of such property, and claimant is entitled to have the said property or the money representing the same applied to the satisfaction of this claim, and is also entitled to have applied to the payment of this claim any and all dividends or sums that may be found by this court to become due and payable from this estate to Merrill, Cox & Company, Fort Dearborn National Bank, a corporation, I. F. Searle, First National Bank of Lincoln, Nebraska, Exchange National Bank of Spokane, Washington, a corporation, Shoshone Lumber Company, a corporation, Idaho Timber Company, a corporation, S. H. Hess,

J. K. Stack, Genevieve Hess Tolerton and Mrs. M. A. Gibbs, until the full amount of advancements and interest at the rate of 6% per annum as hereinabove set forth be paid to the said claimant herein; and in event that the claim of claimant herein to a lien upon all of the properties and moneys of the said Stack-Gibbs Lumber Company, a corporation, a bankrupt, be denied, then and in that event the said claimant is entitled to have any and all dividends or sums that may be found by this court to become due and payable to the persons and corporations hereinabove particularly mentioned as signing said agreement until the full amount of advancements as hereinabove set forth, together with interest at 6% per annum, be paid to the claimant herein, and before any moneys whatsoever from said estate are applied in liquidation and satisfaction of any of the indebtedness of the above named creditors.

(Seal) J. W. REA,

Manager and Secretary of Mechanics Loan & Trust Company, a corporation, Claimant.

Subscribed and sworn to before me this 5th day of January, A. D. 1917.

(Seal) A. E. RUSSELL,

Notary Public in and for the State of Washington, residing at Spokane.

(Endorsed): Filed January 6, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

No. 905

TRUSTEE'S OBJECTIONS TO ALLOWANCE OF CLAIM OF MECHANICS LOAN & TRUST CO.

Your petitioner respectfully shows:

That he is a trustee herein, duly qualified and acting;

That a proof of debt of Mechanics Loan & Trust Company, claiming to be a creditor of the said Stack-Gibbs Lumber Company, a corporation, was filed herein on the 6th day of January, 1917.

That the same should not be allowed for the following reasons:

1. Object that this court has no jurisdiction in this proceeding, or at all to hear or determine the rights of the said claimant, the Mechanics Loan & Trust Company, to any dividend or dividends to be hereafter declared upon the claim of these objectors, or either of them, or of any other creditors of the bankrupt, or to determine any rights whatsoever to the said dividends to be declared herein as between the said claimant and these objectors.

2. That the said claimant is not the owner of the notes declared upon in said petition.

3. That the said claimant, Mechanics Loan & Trust Company, a corporation, did not loan, advance or furnish to the above named bankrupt any sum of money whatsoever, or at all.

4. That the said alleged contract referred to in the proof of claim of said Mechanics Loan & Trust Company, against said bankrupt and attached to the

said claim as Exhibit "A" thereof, was not executed by these objectors nor by the said Mechanics Loan & Trust Company, nor by any person whomsoever.

5. That the said alleged contract attached to the proof of claim of the Mechanics Loan & Trust Company as Exhibit "A" to said claim was never signed by ninety per cent, in amount of the indebtedness of the said bankrupt, and that ninety (90) per cent of the creditors did not attach their signatures to said alleged contract, and said alleged contract never became operative by reason of the failure to acquire the signatures of said ninety (90) per cent, in amount, of said creditors.

6. That said Mechanics Loan & Trust Company, being then the holders of the trust deed on the property of the Dryad Lumber Company, did not extend said trust deed for a period of two years from the first day of February, 1916, or for any period whatsoever, or at all.

7. That the said claimant, the Mechanics Loan & Trust Company, a corporation, did not advance the sum of One Hundred Thousand Dollars, or any part thereof to the said bankrupt by, upon, or under the terms of said alleged contract set out as Exhibit "A" and attached to the proof of claim of said Mechanics Loan & Trust Company, or in any other manner, or at all, and the said Mechanics Loan & Trust Company, a corporation, did not take possession of the property mentioned in said alleged contract or perform any other act under or by virtue of said alleged contract.

8. That the said claimant, the Mechanics Loan

& Trust Company, contrary to the provisions of the said alleged contracts set out, contained in and attached to its said claim as Exhibit "A" thereof, participated in and caused the bankruptcy proceedings herein to be instituted against the bankrupt.

9. Said claimant negligently collected the debts or obligations of said company.

10. Said claimant has been guilty of gross neglect of the trust imposed on it in said contract.

11. That the signers of said agreement are not bound by said agreement by reason of the false and fraudulent representations made to them by C. D. Gibbs, Stack-Gibbs Lumber Company and the Dryad Lumber Company.

12. That said claimant is not authorized and has no authority under the laws of the State of Idaho to contract or act as it alleges in its said petition, and in said alleged contract referred to therein.

13. That said claimant is not entitled to maintain its said petition for the reason that it has not complied with the requirements of the statutes of the State of Idaho with reference to conducting business in said State.

WHEREFORE, your petitioner prays that said claim be rejected and be not allowed.

W. A. ARMSTRONG,
Petitioner.

State of Idaho,
County of Kootenai,—ss.

W. A. Armstrong being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting Trustee in Bankruptcy of the above

bankrupt; that he has read the above petition, knows the contents thereof, and that the same is true as he verily believes.

W. A. ARMSTRONG.

Subscribed and sworn to before me this 6th day of January, 1917.

LAWRENCE. L. LEWIS,
Referee.

(Endorsed): Filed January 6, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

No. 905.

OBJECTIONS OF MERRILL COX & CO. ET AL. TO ALLOWANCE OF CLAIM OF MECHANICS LOAN & TRUST CO.

To L. L. Lewis, Referee in Bankruptcy:

Your petitioners, Merrill Cox & Co., Fort Dearborn National Bank, S. H. Hess, I. F. Searle, Mamie A. Gibbs and Genevieve Hess Tolerton, respectfully show:

That they are creditors in the above entitled cause and have duly filed their claims herein.

That the claimant hereinafter referred to is claiming a preference as to your petitioners as more particularly hereinafter set forth.

That a proof of debt of Mechanics Loan & Trust Company, claiming to be a creditor of the said Stack-Gibbs Lumber Company, a corporation, was filed herein on the 6th day of January, 1917.

That the same should not be allowed for the following reasons:

1. Object that this court has no jurisdiction in this proceeding or at all to hear or determine the rights of the said claimant, the Mechanics Loan & Trust Company, to any dividend or dividends to be hereafter declared upon the claim of these objectors, or either of them, or of any other creditors of the bankrupt, or to determine any rights whatsoever to the said dividends to be declared herein as between the said claimant and these objectors.

2. That the said claimant is not the owner of the notes declared upon in said petition.

3. That the said claimant, Mechanics Loan & Trust Company, a corporation, did not loan, advance or furnish to the above named bankrupt any sum of money whatsoever, or at all.

4. That the said alleged contract referred to in the proof of claim of said Mechanics Loan & Trust Company, against said bankrupt and attached to the said claim as Exhibit A thereof, was not executed by these objectors not by the said Mechanics Loan & Trust Company, nor by any person whomsoever.

5. That the said alleged contract attached to the proof of claim of the Mechanics Loan & Trust Company as Exhibit A to said claim was never signed by ninety (90) per cent, in amount of the indebtedness of the said bankrupt, and that ninety (90) per cent of the creditors did not attach their signatures to said alleged contract, and said alleged contract never became operative by reason of the failure to acquire the signatures of said ninety (90) per cent, in amount of said creditors.

6. That said Mechanics Loan & Trust Company, being then the holders of the trust deed on the property of the Dryad Lumber Company, did not extend said trust deed for a period of two years from the first day of February, 1916, or for any period whatsoever or at all.

7. That the said claimant, the Mechanics Loan & Trust Company, a corporation, did not advance the sum of One Hundred Thousand Dollars, or any part thereof, to the said bankrupt by, upon or under the terms of said alleged contract set out as Exhibit A and attached to the proof of claim of said Mechanics Loan & Trust Company, or in any other manner, or at all, and the said Mechanics Loan & Trust Company, a corporation, did not take possession of the property mentioned in said alleged contract or perform any other act under or by virtue of said alleged contract.

8. That the said claimant, the Mechanics Loan & Trust Company, contrary to the provisions of the said alleged contracts set out, contained in and attached to its said claim as Exhibit A thereof, participated in and caused the bankruptcy proceedings herein to be instituted against the bankrupt.

9. Said claimant negligently collected the debts or obligations of said company.

10. Said claimant has been guilty of gross neglect of the trust imposed on it in said contract.

11. That the signers of said agreement are not bound by said agreement by reason of the false and fraudulent representations made to them by C. D.

Gibbs, Stack-Gibbs Lumber Company and the Dryad Lumber Company.

12. That said claimant is not authorized and has no authority under the laws of the State of Idaho to contract or act as it alleges in its said petition, and in said alleged contract referred to therein.

13. That said claimant is not entitled to maintain its said position for the reason that it has not complied with the requirements of the statutes of the State of Idaho with reference to conducting business in said State.

WHEREFORE, your petitioner prays that said claim be rejected and be not allowed.

I. F. SEARLES and MAMIE A. GIBBS,
Claimants, by H. W. Canfield, Attorney.
FORT DEARBORN NATIONAL BANK,
MERRILL COX & CO.,
By Elmer H. Adams, Their Attorney.
S. H. HESS and GENEVIEVE HESS TOLERTON,
By Danson, Williams & Danson, Their Attorneys.
Petitioners.

State of Idaho,
County of Kootenai,—ss.

Elmer H. Adams, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting agent for Merrill Cox & Co., claimants of the above bankrupt; that he has read the above petition, knows the contents thereof and that the same is true as he verily believes.

ELMER H. ADAMS.

Subscribed and sworn to before me this 6th day of January, 1917.

(Signed) LAWRENCE L. LEWIS.

(Title of Court and Cause.)

No. 905.

PETITION OF EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON.

Comes now the Exchange National Bank of Spokane, Washington, and petitions the above entitled court and represents as follows:

1. That at all the times herein mentioned the Exchange National Bank of Spokane was and now is a national bank organized under the laws of the United States relating to national banks.

2. That at all the times mentioned herein the Mechanics Loan & Trust Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and is authorized to do business under the laws of the State of Idaho relating to foreign corporations.

3. Your petitioner represents that on or about February 1, 1916, the Stack-Gibbs Lumber Company was a corporation operating a lumber mill at Gibbs, Idaho, and was also engaged in the business of logging and manufacturing lumber and allied products and other business relating thereto. That on or about the said date it was represented that the said Stack-Gibbs Lumber Company and also the Dryad Lumber Company, a corporation, by C. D. Gibbs, an officer and trustee and representative of each of said companies at said time, that the assets

of said companies greatly exceeded the indebtedness of the said companies but that they were unable to obtain money to pay the indebtedness due and then presently to become due, and it was agreed by the said Stack-Gibbs Lumber Company, a corporation, the Dryad Lumber Company, a corporation, C. D. Gibbs and Mechanics Loan & Trust Company, a corporation, that a plan be adopted for realizing upon the property of the lumber company and the mill company and for securing the money to pay their then due indebtedness and for satisfying their then due indebtedness, and the said parties entered into an agreement, which said agreement is attached to the claim of the Mechanics Loan & Trust Company heretofore filed herein and referred to as part of this petition. Said agreement was marked "Exhibit A" on the claim of said Mechanics Loan & Trust Company and such agreement was also signed by Merrill, Cox & Company, a corporation, Fort Dearborn National Bank, a corporation, I. F. Searle, First National Bank of Lincoln, Nebraska, a corporation, Exchange National Bank of Spokane, a corporation, Shoshone Lumber Company, a corporation, Idaho Timber Company, a corporation, S. H. Hess, J. K. Stack, Genevieve Hess Tolerton and Mrs. M. A. Gibbs, all of said parties consenting to and acquiescing in the plan outlined in said agreement mentioned above, a true copy of which said agreement is hereto attached and marked "Exhibit A."

4. It was further provided in said instrument, in paragraph 2 thereof, that the Mechanics Loan &

Trust Company, as trustee, might in its discretion, but should not be required to, carry on the whole or any part of said business theretofore conducted by the said lumber company, and the said mill company.

5. And it was further provided in section 10 of the conditions of said instrument that the trustee, viz., Mechanics Loan & Trust Company, a corporation, should advance such sums of money as it should deem necessary to meet the then due payroll of the said lumber company and the said mill company, and to discharge the claims of creditors who did not execute the said instrument, as it was deemed necessary and requisite to protect the Trust Company, not to exceed the sum of $100,000, and that the said trustee, viz., the Mechanics Loan & Trust Company, a corporation, should have a first and preference claim upon said trust estate for the amount of such advancements and the same should be repaid to it out of the first proceeds of the sale of the trust property or any part thereof or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of six per cent. per annum.

It was further provided in said instrument marked "Exhibit A" that the proceeds of the trust estate after reimbursing the trustee for advancements, expenses, compensation and other claims mentioned therein, should be distributed pro-rata among the creditors of the lumber company and the mill company.

Pursuant to said plan and agreement, between the dates of February 9, 1916, and May 11, 1916, the said Mechanics Loan & Trust Company, a corporation, did advance or cause to be advanced to the said Stack-Gibbs Lumber Company, a corporation, for the purposes set forth in said instrument, the sum of $100,000, which amount was evidenced by notes executed by the Stack-Gibbs Lumber Company, a corporation, made payable to the order of Mechanics Loan & Trust Company or to the Exchange National Bank of Spokane, which said notes and each of them drew interest at the rate of six per cent. per annum from date and were made payable ninety days after date, and all the money advanced by the said Mechanics Loan & Trust Company under and by virtue of the said agreement was furnished, at its instance and request and at the instance and request of the several parties who signed said instrument marked Exhibit "A," by the said Exchange National Bank of Spokane, and the said Stack-Gibbs Lumber Company did receive the full sum of $100,000 so advanced. That as the said notes became due before the petition in bankruptcy herein was filed they were not paid but renewed by the said Stack-Gibbs Lumber Company. A list of said renewal is as follows:

> 8 notes for $5,000 each, dated May 9, 1916, due 90 days after date, with interest on each of said notes from May 9, 1916, to date of filing the petition, amounting to $67.51, which notes are hereto attached and made a part hereof, marked Exhibits "B" to "I" inclusive.

1 note for $2,500, dated May 11, 1916, with interest thereon from date until July 29, 1916, amounting to $32.93, which note is hereto attached and made a part hereof, marked Exhibit "J."

2 notes for $2,500, each, dated May 11, 1916, payable to the Exchange National Bank of Spokane, on demand, which notes are hereto attached and made a part hereof, marked Exhibits "K" and "L," and which said notes were given by the said Stack-Gibbs Lumber Company to take the place and stead of notes for the same amounts made payable to the Mechanics Loan & Trust Company, the said original notes being placed in the hands of the Exchange National Bank of Spokane for the purpose of collection, and through inadvertence and mistake the said bank took the renewal notes on the bank's form of promissory notes and each of said notes was endorsed by the Mechanics Loan & Trust Company.

4 notes for $5,000 each, dated May 16, 1916, payable 90 days after date, which notes are hereto attached and made a part hereof, marked Exhibits "M" to "P" inclusive, and said notes being made out on the form of note running to the Exchange National Bank of Spokane. These notes were renewals of notes running to the Mechanics Loan & Trust Company which had been placed in the hands of the Exchange National Bank of Spokane for the purpose of collection and said renewal notes were inadvert-

ently made out on the form of note running to the Exchange National Bank of Spokane, and each of said notes were endorsed by the Mechanics Loan & Trust Company.

1 note for $5,000, dated May 24, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "Q."

1 note for $5,000, dated May 26, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "R."

1 note for $5,000, dated June 5, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "S."

1 note for $5,000, dated June 6, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "T."

1 note for $5,000, dated June 8, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "U."

1 note for $2,500, dated June 13, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "V."

1 note for $5,000, dated July 7, 1916, payable 90 days after date, which is hereto attached and made a part hereof, marked Exhibit "W."

That each of said notes drew interest at the rate of six per cent. per annum from their respective dates and the total amount of interest due on the total number of notes herein mentioned on July 29, 1916, was $1162.91, making the total amount due and payable on account of said money advances as aforesaid the sum of $101,162.91, which amount remains due and unpaid. That no part of said debt has been paid and there are no set-offs or counterclaims to the same, and the said Mechanics Loan & Trust Company, a corporation, has not, nor has this petitioner or any one by its order, to its knowledge or belief, had or received any manner of security for said debt whatever except as herein set forth. That the notes marked "Exhibit "B" to "I" inclusive, are endorsed by C. D. Gibbs and those notes marked Exhibits "S," "T" and "U" are endorsed by the said C. D. Gibbs. That no judgment has been rendered on said claim.

Your petitioner further represents that but for the agreement entered into as hereinbefore stated and as evidenced by the written contract heretofore referred to and the signing of the same by the persons and corporations mentioned above, the said Mechanics Loan & Trust Company would not have advanced or caused to be advanced the said sum of $100,000 or any part thereof, nor would this petitioner have advanced at the instance and request of the said Mechanics Loan & Trust Company and said other parties signing said Exhibit "A," or any of them, the said sum of $100,000, or any part thereof, upon which said sum with interest the claim of

the Mechanics Loan & Trust Company is based and because of which the said Mechanics Loan & Trust Company claims a lien on all the property of each and every kind and character belonging to the said Stack-Gibbs Lumber Company and the said Dryad Lumber Company, or either of them, or in lieu thereof, the money now in the hands of the Trustee in Bankruptcy, which was derived from the sale of any of such property, and the dividends of the various creditors who signed said Exhibit "A."

Your petitioner further states that before the filing of the claim herein for the sum of $101,162.91 by the Mechanics Loan & Trust Company, your petitioner delivered to said Mechanics Loan & Trust Company, the said promissory notes referred to herein and also referred to in the claim of said trust company, and authorized said trust company to file a claim herein in its own name therefor in the manner and form of its said amended claim, and does hereby authorize said Mechanics Loan & Trust Company to proceed in its own name with the enforcement of the collection of said claim and the enforcement of the lien claimed by it in the above entitled proceedings.

This petition is made and filed for the purpose of removing any possible doubt as to the party who is entitled to have said claim allowed and any and all possible technical objections in relation to said claim of the Mechanics Loan & Trust Company.

WHEREFORE, your petitioner prays that the claim of said Mechanics Loan & Trust Company hereinbefore filed in said cause for the said sum of

$101,162.91 be allowed to said Trust Company and that said Trust Company have a preference as prayed for therein, and that all dividends thereon be paid to said Trust Company.

EXCHANGE NATIONAL BANK OF SPOKANE.
By Edwin T. Coman, President.

Post, Russell, Carey & Higgins, Attorneys for Petitioner.

State of Washington,
County of Spokane,—ss.

Edwin T. Coman, being first duly sworn, on oath deposes and says: That he is the President of the EXCHANGE NATIONAL BANK OF SPOKANE, Washington, and is authorized by it to make this verification in support of the foregoing petition; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true, and that he is authorized by the said Exchange National Bank of Spokane, Washington, to make the foregoing petition for and on its behalf.

EDWIN T. COMAN.

Subscribed and sworn to before me this 17th day of February, A. D. 1917.

A. E. RUSSELL,
Notary Public in and for the State of Washington, residing at Spokane.

(N. P. Seal.)

EXHIBIT A.

This Indenture, made this 1st day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen, by and between STACK-GIBBS

LUMBER COMPANY, a Corporation organized under the laws of Michigan, hereinafter referred to as the "Lumber Company," DRYAD LUMBER COMPANY, a corporation organized under the laws of Washington, hereinafter referred to as the "Mill Company," C. D. GIBBS, of Spokane, Washington, hereinafter referred to as "Stockholder," and MECHANICS LOAN & TRUST COMPANY, a corporation organized and existing under the laws of Washington, hereinafter known as "holder of Trust Deed," parties of the first part, and MECHANICS LOAN & TRUST COMPANY, a corporation organized and existing under the laws of the State of Washington, hereinafter referred to as the "Trustee," party of the second part and sundry creditors of the Lumber Company and the Mill Company, who have executed this instrument for the purpose of acceding to its terms and becoming bound thereby, who are hereinafter referred to as the "Creditors," party of the third part.

WITNESSETH.

That Whereas, the Lumber Company and the Mill Company have heretofore been and are now engaged in the business of logging and the manufacture of lumber and allied products, and as well other business relating thereto, in the course of which business they have incurred indebtedness to divers individuals and corporations.

And Whereas, the value of the property of the Lumber Company, and the Mill Company considerably exceeds their indebtedness, but nevertheless

they are unable to obtain means to pay the indebtedness due and presently to become due.

And Whereas, all the parties hereto are agreed that the plan herein outlined for realizing upon the property of the Lumber Company and the Mill Company and securing money to pay their presently due indebtedness and for satisfying their indebtedness is for the best interests of all concerned, and necessary to be adopted in order to avoid the heavy costs and expenses which would attend upon the realizing upon their property and the settlement of their indebtedness through receivership or bankruptcy proceedings;

Now Therefore, in consideration of the premises hereof and of other good and valuable consideration moving between the parties hereto, the said Stack-Gibbs Lumber Company and the said Dryad Lumber Company do hereby assign, transfer, set over, give, grant, bargain, sell, convey, remise, release and confirm unto the said Mechanics Loan & Trust Company, its successors or assigns, as Trustees as hereinafter set forth, all and singular the hereinafter described property, to-wit:

The following described real estate situate in Benewah County, State of Idaho, to-wit:

Lot numbered Four (4) or the Northwest Quarter of the Northwest Quarter (NW¼ of NW¼) of Section Five (5), Township Forty-three (43), North of Range One (1), West of Boise Meridian; Northwest Quarter (NW¼) of Section Twenty-four (24), Township Forty-four (44), North of Range One (1), West of Boise Meridian; South Half of

Southeast Quarter (S½ of SE¼) and South Half of Southwest Quarter (S½ of SW¼) in Section Twenty-eight (28), Township Forty-four (44), North of Range One (1), West Boise Meridian; East Half of Southeast Quarter (E½ of SE¼) and Southwest Quarter of Southeast Quarter (SW¼ of SE¼) of Section Four (4), Township Forty-three (43), North of Range Two (2), W. B. M.; Lot Three (3) or the Northwest Quarter of Northeast Quarter (NW¼ of NE¼) and the Southwest Quarter of the Northeast Quarter (SW¼ of NE¼) of Section Nine (9), Township Forty-three (43), North of Range Two (2), W. B. M.; the East Half of the Northeast Quarter (E½ of NE¼) of Section Ten (10), Township Forty-three (43), North of Range Two (2), W. B. M.; Northwest Quarter of Southwest Quarter (NW¼ of SW¼) of Section Ten (10), Township Forty-three (43), North of Range One (1), East of Boise Meridian; Northwest Quarter (NW¼) of Section Nineteen (19), Township Forty-four (44), North of Range One (1), East of Boise Meridian; Lot numbered Seven (7) in Block numbered Three (3) in River Front Addition to the Town of St. Maries;

All the standing timber, together with the right to cut and remove the same, on the following described real estate situate in said Benewah County:

Lots One (1) and Two (2) or the North Half of the Northeast Quarter (N½ of NE¼), the South Half of the Northeast Quarter (S½ of NE¼), Lots Three (3) and Four (4) or North Half of North-

west Quarter (N½ of NW ¼), the South Half of the Northwest Quarter (S½ of NW¼), the North Half of the Southwest Quarter (N½ of SW¼), the North Half of the Southeast Quarter (N½ of SE¼), and the Southeast Quarter of the Southeast Quarter (SE¼ of SE¼) of Section Four (4), Township Forty-three (43), North of Range One (1), West Boise Meridian; Lots One (1) and Two (2) or the North Half of the Northeast Quarter (N½ of NE¼), the South Half of the Northeast Quarter (S½ of SE¼) and the Southwest Quarter of the Southeast Quarter (SW¼ of SE¼) of Section Five (5), Township Forty-three (43), North of Range One (1), West of Boise Meridian; the Northeast Quarter, the Northwest Quarter and the West Half of the Southwest Quarter (NE¼, NW¼, W½ of SW¼) of Section Nine (9), Township Forty-three (43), North of Range One (1), West of the Boise Meridian; all of Section Four (4), Township Forty-four (44), North of Range One (1), W. B. M.; the South Half of the Southeast Quarter (S½ of SE¼) of Section Fifteen (15), the same township and range; the North Half of the Northwest Quarter (N½ of NW¼) and the Northwest Quarter of the Northeast Quarter (NW¼ of NE¼), the Southwest Quarter of the Southeast Quarter (SW¼ of SE¼) of Section Twenty-two (22), same township and range; the West Half of the Northeast Quarter (W½ of NE¼) and the Northwest Quarter of the Southeast Quarter (NW¼ of SE¼) of Section Twenty-seven (27), the same township and range; the Northeast Quarter (NE¼)

of Section Twenty-eight (28), the same township and range.

The following described real estate, situate in the County of Shoshone, State of Idaho:

Southwest Quarter of Northeast Quarter (SW¼ of SE¼), Southeast Quarter of Northwest Quarter (SE¼ of NW¼), Lots Three (3) and Four (4) or the North Half of the Northwest Quarter (N½ of NW¼) of Section Two (2), Township Forty-two (42), North of Range One (1), East of the Boise Meridian; Lots One (1) and Two (2) or the North Half of the Northeast Quarter (N½ of NE¼) of Section Three (3), same township and range; the Southwest Quarter of the Northeast Quarter (SW¼ of NE¼), the Southeast Quarter of the Northwest Quarter (SE¼ of NW¼), the Northeast Quarter of the Southwest Quarter (NE¼ of SW¼) and the Northwest Quarter of the Southeast Quarter (NW¼ of SE¼) of Section Twenty-four (24), same township and range; the Northeast Quarter of the Southwest Quarter (NE¼ of SW¼) of Section Ten (10), Township Forty-three (43), North of Range One (1), East of Boise Meridian; Southeast Quarter of the Northeast Quarter (SE¼ of NE¼) of Section Two (2), same township and range; the Southwest Quarter of the Northwest Quarter (SW¼ of NW¼) and the Northwest Quarter of the Southwest Quarter (NW¼ of SW¼) of Section Twenty-three (23), same township and range; the West Half of the Northeast Quarter (W½ of NE¼) and the West Half of the Southeast Quarter (W½ of SE¼) of Section Thirty-four (34), same township and range;

the East Half of the Southwest Quarter (E½ of SW¼) and the West Half of the Southeast Quarter (W½ of SE¼) of Section Thirty-five (35), same township and range; the Southwest Quarter and the West Half of the Southeast Quarter (SW¼, W½ of SE¼) of Section Twenty-four (24), Township Forty-eight (48), North of Range One (1), East of Boise Meridian; the Northeast Quarter and the North Half of the Southeast Quarter (NE¼, N½ of SE¼) of Section Twenty-five (25), same township and range; the North east Quarter (NE¼) of Section Twenty-six (26), same township and range; the Southeast Quarter of the Northeast Quarter (NE¼ of SE¼) of Section Two (2), Township Forty-five (45), North of Range Two (2), East of the Boise Meridian.

All the standing timber and the right to cut and remove the same on the following described real estate, situate in Shoshone County, Idaho:

The Northeast Quarter of the Northwest Quarter (NE¼ of NW¼) of Section Three (3), Township Forty-two (42), North of Range One (1), East of the Boise Meridian; the Southeast Quarter of the Southeast Quarter (SE¼ of SE¼) of Section Twenty-two (22), Township Forty-three (43), North of Range One (1), East of the Boise Meridian; the Southwest Quarter of the Southwest Quarter (SW¼ of SW¼) of Section Twenty-three (23), the same township and range; the East Half of the Northeast Quarter (E½ of NE¼) of Section Twenty-seven (29), the same township and range.

Also the following described real estate situate in Clearwater County, State of Idaho:

Lots One (1) and Two (2) or the North Half of the Northeast Quarter (N½ of NE¼), the South Half of the Northeast Quarter (S½ of NE¼), Lots Three (3) and Four (4) or the North Half of the Northwest Quarter (N½ of NW¼), the South Half of the Northwest Quarter (S½ of NW¼) and the Southwest Quarter (SW¼) of Section Five (5), Township Forty-one (41), North of Range Two (2), East of the Boise Meridian.

The standing timber and the right to cut and remove the same on the following described real estate situate in Clearwater County, State of Idaho:

The West Half of the Northwest Quarter (W½ of NW¼) of Section Twenty-nine (29), Township Thirty-nine (39), North of Range Three (3), East of the Boise Meridian; the East Half of the Northeast Quarter (E½ of NE¼) of Section Thirty (30), same township and range;

The following described real estate situate in Latah County, State of Idaho:

The Southeast Quarter of the Southeast Quarter (SE¼ of SE¼) of Section Fourteen (14), Township Forty-two (42), North of Range One (1), West of the Boise Meridian; the Northeast Quarter of the Northeast Quarter (NE¼ of NE¼) of Section Twenty-three (23), same township and range; the North Half of the Northwest Quarter (N½ of NW¼), the East Half of the Southwest Quarter (E½ of SW¼), the West Half of the Southeast Quarter (W½ of SE¼) of Section Twenty-four

(24), same township and range; the Southeast Quarter of the Northeast Quarter (SE¼ of NE¼) of Section Twenty-five (25), same township and range; and South Half of the Northeast Quarter (S½ of NE¼), Southeast Quarter of Northwest Quarter (SE¼ of NW¼), Northwest Quarter of Southeast Quarter (NW¼ SE¼) of Section Eight (8), Township Forty-two (42), North of Range One (1), East of the Boise Meridian; the North Half of the Northeast Quarter (N½ of NE¼).

East Half of the Northwest Quarter (E½ of NW¼) of Section Eighteen (18), same township and range; the East Half of the Southeast Quarter (E½ of SE¼) of Section Twenty-eight (28), same township and range; the East Half of the Northeast Quarter (E½ of NE¼) of Section Thirty-three (33), same township and range.

The standing timber and the right to cut and remove the same on the following described real estate, situate in Latah County, Idaho:

Lot Four (4) or the Northwest Quarter of Northwest Quarter (NW¼ of NW¼), the Southwest Quarter of Northwest Quarter (SW¼ of NW¼) and the Northwest Quarter of Southwest Quarter (NW¼ of SW¼) of Section Three (3), Township Forty-two (42), North of Range One (1), East of the Boise Meridian.

The following described real estate situate in Kootenai County, State of Idaho:

Lot Forty-six (46), Section Fourteen (14), Township Fifty (50), North of Range Four (4), West of Boise Meridian, excepting right-of-way sold to Coeur

d'Alene & Pend d'Oreille Railway Company and water-rights sold to Dryad Lumber Company for boom purposes; Lot Forty-seven (47), Section Fourteen (14), the same township and range, except water-rights sold to Dryad Lumber Company for booming purposes.

Also the property real, personal and mixed of Dryad Lumber Company, as more fully described in the schedule hereto attached marked "Exhibit A" and made a part hereof, it being agreed that said schedule contains a correct description of all the property owned by said Dryad Lumber Company.

Also all the fixtures, machinery, stock in trade, raw, wrought, and in process of manufacture, tools, horses, carriages, wagons, railroad, sidings, spurs, turn-outs, roadbeds, trestles, locomotives, cars, rolling stock, tracks, rails, bridges, engines, boilers, dynamos, lines, poles, wires, cables, conduits, instruments, equipment, appliances, materials, moneys, books, papers, records, accounts, franchises, licenses, agreements, contracts, rights, easements, promissory notes, policies of insurance, and all other property and property rights of whatsoever character or nature, and wherever situate, real, personal or mixed, now or at any time hereafter acquired, owned, held, possessed, or enjoyed, or in any manner conferred upon the Lumber Company and the Mill Company, it being intended and agreed that all of the property of every kind now owned, possessed, or enjoyed, and which may hereafter be in anywise acquired, owned, possessed, or enjoyed by the Lumber Company and Mill Company, shall be as fully embraced within the

provisions hereof and subject to the lien hereby created as if the said property were now owned by the Lumber Compay and the Mill Company and were specifically described herein, and specifically conveyed hereby.

To Have and to Hold to the said Trustee, its successors or assigns, to its and their use forever, but in trust, nevertheless, and for the uses and purposes following, to-wit:

1. The Trustee shall forthwith take possession of the trust estate as of an estate in fee simple, and shall have and possess the same power to control, use, manage, and dispose of the same, and to incur all proper expenses in connection therewith, as in its judgment shall seem to the best interest of all the parties hereto, as though it was the absolute owner thereof.

2. The Trustee may, in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company; may operate mills, cut logs, saw timbers, manufacture lumber into various forms, and transact any form of business heretofore conducted by the Lumber Company and Mill Company and for such purposes, or any other purpose which it deems proper and in realizing upon the trust estate, may use any and all of the trust estate as it thinks best, and in carrying on such business it may incur such expense as it thinks necessary to the proper conduct thereof, including necessary maintenance, replacement or supplying of new tools, machinery and apparatus.

3. The Trustee may employ such persons as it deems necessary, officers and employees of the Lumber Company and Mill Company, as well as others, for the proper management, use, enjoyment and realization upon the trust estate, and may pay persons so employed reasonable compensations.

4. The Trustee shall collect such debts owing to the Lumber Company and Mill Company as are collectible in the exercise of ordinary diligence, and may take security for, extend time of, compromise, or in any way it thinks proper settle any debt which in its opinion is of doubtful collectibility.

5. The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof, and shall have power to sell and convey any or all of the trust estate at such prices and upon such terms as it considers proper, and its deed or bill of sale shall convey full and complete title to the purchaser free and clear of all right, title, claim, or lien of the Lumber Company and the Mill Company or of any other party hereto.

6. The Trustee shall receive as compensation, for its services as Trustee hereunder, the sum of Ten Thousand Dollars, ($10,000.00) provided the Trusteeship is terminated within two (2) years from the date hereof, and shall be entitled to reimbursement for sums paid for legal services in the administration of the Trust, including the preparation of this Instrument.

7. The Trustee may, but shall not be required to, pay the claim of any creditor of the Lumber Com-

pany and the Mill Company who does not desire to become or who is deemed inadvisable to have become a party to this instrument, except as modified in section 10 hereof.

8. The Trustee may institute, conduct or defend any suit or litigation which it considers advisable or necessary to the protection of the trust estate, and it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation, including attorney's fees.

9. If in the conduct and management of the trust estate, damage is done third parties to whom the Trustee is or may be held liable therefor, the Trustee shall be reimbursed and indemnified against any liability of claim therefor from the trust estate, whether such damage was caused by the negligence or misconduct of its officers, agents and employees, or not.

10. The Trustee shall advance such sums of money as it shall deem necessary to meet the present payroll of the Lumber Company and the Mill Company, and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000) Dollars, and the Trustee shall have a first and preference claim upon said trust estate for the amount of such advancement, and the same shall be repaid to it out of the first proceeds of sales of the trust property, or any part thereof, or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the

date of such advancement at the rate of six per cent. per annum.

11. Payments made by the Trustee under the provision of Sections 1 to 10 inclusive hereof, with interest from the time of payment to reimbursements, as well as the compensation of the Trustee, shall be deemed maintenance charges of the trust estate and shall be paid from the proceeds of the trust estate in preference to any other claims thereupon.

12. The Lumber Company and the Mill Company may execute notes, or may renew existing notes, or renew renewal notes, for their indebtedness, and any such notes or renewals shall have the same right hereunder as have the claims of the creditors in their present form.

13. The Trustee may, but it shall not be required to, pay interest accruing upon the interest bearing claims of the creditors, if it has money in the trust estate which it deems not required for other purposes; provided, however, that any such interest payment shall be pro-rated among all the creditors holding interest bearing claims.

14. The Creditors agree that neither this instrument nor anything done or to be done in pursuance of its provisions shall be construed as a preference to any creditor, or an act of bankruptcy, but that it is entered into in pursuance of a plan which is considered equitable between all the creditors of the Lumber Company and the Mill Company and which will secure the most advantageous disposal of their property for the benefit of their creditors. The

Creditors likewise agree that while this instrument remains in effect, and no provision hereof is violated, they will not sue the Lumber Company or the Mill Company in any court on their demands nor commence any bankruptcy or receivership proceedings against them. They understand and agree, also, that the Lumber Company and the Mill Company would not have executed this instrument and that the Trustee would not have consented to act as Trustee hereunder or to assume the obligations herein assumed by it, except upon the express agreement of the Creditors in this section contained.

15. The Trustee may select and employ in and about the execution of the trust suitable agents and attorneys, and it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent or attorney, if reasonable care has been exercised in the selection, and shall not be held liable for any loss or damage not caused by its own negligence or default. Neither shall it be held to have agreed to pay or be liable for any loss or damage occasioned by its failure to pay any tax, assessment, indebtedness or lien upon the trust estate, save and except the taxes, indebtedness and charges which in the tenth section hereof it has expressly agreed to pay.

16. It is understood that the Central Warehouse Lumber Company of Minneapolis, Minnesota, has advanced to the Lumber Company a sum of approximately Thirty-two Thousand Dollars ($32,000) under an agreement whereby the amount of such advancement shall be repaid in whole in part in lum-

ber, and it is agreed that said Trustee shall recognize said contract and carry out and perform the terms thereof notwithstanding any contrary provisions herein contained. It is also agreed that if there should be any other outstanding contracts of similar nature entered into by the Lumber Company or the Mill Company, the Trustee may in its discretion and according to its best judgment carry out the terms thereof, or make such adjustment thereof as to it may seem just and proper.

17. If at any time during the continuance of the trust any tax, charge or indebtedness shall accrue which would be a lien or charge upon the trust estate superior to the claims of the parties hereto, and which, in the opinion of the Trustee, it is to the best interests of the parties hereto to be paid, then the Trustee may, but shall not be required to, pay such tax, charge or indebtedness, and thereupon the amount so paid, together with interest thereon at the rate of six per cent. per annum from date of payment, shall become a charge upon the trust estate, and shall be paid out of the first money available therefrom.

18. The trust hereby created shall terminate (a) upon the payment of all the indebtedness owing by the Lumber Company to the parties to this agreement, (b) upon the agreement of the Creditor representing at least a majority in amount of the indebtedness of the Lumber Company, and who shall have signed the within agreement to the effect that the trust shall be terminated and the trust estate reconveyed to the Lumber Company and the Mill

Company without liability on the part of the Trustee, or (c) upon the disposition of the entire trust estate and the application of its proceeds as herein provided.

The Creditors signing the within instrument shall make out and file with the Trustee their claims against the Lumber Company and the Mill Company within sixty (60) days from notice of the acceptance of the within trust by the trustee. Copies of said claims shall be sent by the trustee, to the Lumber Company and the Mill Company and to each creditor who shall have signed the within instrument, and if no objections to same shall be filed with the trustee within thirty (30) days thereafter, then such claims shall be allowed by the Trustee as filed. The proceeds of the trust estate, after reimbursing the Trustee for advancements, expenses, compensation and other claims mentioned herein, shall be distributed pro rata among the Creditors of the Lumber Company and the Mill Company. Upon the termination of the trust and an accounting by the Trustee with the Lumber Company and the Mill Company and the Creditors, and the reimbursement of the Trustee for all sums expended or loaned by it hereunder, the trust estate shall be reconveyed to the Lumber Company and the Mill Company.

19. The compensation of the Trustee and expenses incurred and advancements made by it shall constitute a charge upon the trust estate superior to the indebtedness of any party secured hereby, and the Trustee may not be removed nor be deprived of the trust estate in any manner until the payment

of its compensataion, expenses and advancements have been fully provided for, provided that upon the failure of the trustee to accept the trust hereunder or upon its refusal to act after its acceptance, the creditors who have signed this instrument, holding a majority in amount of the indebtedness, of the Lumber Company, may by deed appoint a new trustee.

The Lumber Company and the Mill Company agree that they will execute such further and additional conveyances, undertakings and agreements as shall be necessary to fully effectuate the intent of this instrument and vest title to all of their property in the Trustee, in trust for the uses and purposes herein provided.

Several copies hereof may be executed and delivered, and each copy which is duly executed and delivered shall be treated for all purposes as an original instrument.

20. This instrument shall not take effect until creditors representing ninety per cent. in amount of the indebtedness of the Lumber Company, have attached their signatures hereto and until the holder of the Trust Deed on the property of the Mill Company, which Trust Deed is due, has extended same for a period of two years from date, provided, however, that the debt represented by the Trust Deed shall pro rate with the other Creditors, who have signed the within instrument, as to all distributions of dividends after one year from date hereof.

21. It is further agreed that this instrument shall not take effect until said Stockholder shall cause

a meeting of the Stockholders of said Lumber Company and said Mill Company, to be held immediately, at which the resignations of the present Secretaries and Treasurers of the two companies shall be obtained, and also the resignations of one of the directors of each of said companies, and that Siegmund Katz, of Chicago, Illinois, shall be elected by said Stockholders of said Lumber Company and said Mill Company, a Director and Secretary and Treasurer of each of said companies, and provided further that said Katz, or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument, shall name, shall be elected and retained as such Director and officer of such Lumber Company and such Mill Company, until the trust created by the within instrument shall be terminated.

22. It is specificallly agreed that the claim of the Shoshone Lumber Company, for the sum of Five Thousand Dollars, ($5,000) and interest represents the purchase price of timber, on which a Vendors lien is retained by the said Shoshone Lumber Company, until the payment of said purchase price, and it is agreed that said claim will be paid by the Trustee within six (6) months from date hereof, as a preferred claim.

23. It is further agreed that the claim of the Idaho Timber Company is secured by the ownership of the following log mark placed upon certain White Pine and Spruce logs landed upon Marble Creek, to-wit:

Bark mark, D E, and

End mark, A.

And such logs hereafter delivered to the Lumber Company or to the Mill Company shall be paid for by the Trustee at the rate of Sixteen ($16.00) Dollars per thousand feet, board measure, for White Pine logs, and Six ($6.00) Dollars, per thousand feet for Spruce logs and the amount thereof shall be deducted from the claim of said Idaho Timber Company. The balance of said claim shall pro rate with the other Creditors in accordance with the terms of this instrument.

In Witness Whereof, the parties hereunto have set their hands and affixed their corporate seals the day and year herein first written.

STACK-GIBBS LUMBER COMPANY,

(Corporate Seal) By C. D. Gibbs, President.

S. Katz, Secretary.

DRYAD LUMBER COMPANY,

By B. G. Nelson, President.

(Seal) S. Katz, Secretary.

(Seal)

C. D. Gibbs, Stockholder.

MECHANICS LOAN & TRUST COMPANY,

(Corporate Seal) *Holder of Trust Deed.*

By Wm. Huntley, President.

William H. Kaye, Asst. Secretary.

MECHANICS LOAN & TRUST COMPANY,

(Corporate Seal) *Trustee.*

By Wm. Huntley, President.

William H. Kaye, Asst. Secretary.

EXHIBIT A.

All of the following described real estate and personal property, estates, rights, privileges and appurtenances situated and being in the County of Kootenai, State of Idaho, to-wit:

Lot eight (8) and lot nine (9) and that part of lot seven (7) lying south of the right of way of the Northern Pacific Railway in section eleven (11) township 50, N., Range 4 W. B. M., excepting the right-of-way of the Coeur d'Alene & Spokane Railway Company through said lot eight (8), said right-of-way so excepted being sixty feet in width, and the center line thereof being described as follows, to-wit:

"Beginning at a point on the east boundary line of said lot eight (8) 424 feet more or less north of a stone monument on the north bank of the Spokane River, said monument being the southeast corner of said lot eight (8), thence north 51 degrees, 31 minutes west five feet; thence on a curve to the left 5730 feet radius for a distance of 716.6 feet to a point on the west line of said lot (8) at a distance of 419 feet more or less south of the west quarter corner of said section eleven (11)," excepting also such rights as the Coeur d'Alene & Spokane Railway Company may have under the lease from Lost Lake Lumber Company to said Coeur d'Alene & Spokane Railway Company, dated October 20th, 1906, and excepting such rights as the Northern Pacific Railway Company may have to the spur track running to the Planing Mill; excepting also that portion of lot eight (8) deeded by party of the first part April 22nd, 1910, to the Coeur d'Alene & Pend d'Oreille

Railway Company for right-of-way described as follows: "Beginning at a point on the west line of said lot eight (8), section eleven (11) at the intersection of the north line of the right of way of the Coeur d'Alene & Spokane Railway Company, thence running in a southeasterly direction along said north line of said right of way to the east line of said lot eight (8), thence north along the east line of said lot eight (8) to a point on said east line two hundred feet northeasterly from the center line of the Coeur d'Alene & Spokane Railway Company measured at right angles thereto, thence in a northwesterly direction four hundred (400) feet to a point which is sixty feet northeasterly from the north line of the right of way of said Coeur d'Alene & Spokane Railway Company measured at right angles thereto; thence northwesterly along a line sixty feet north of and parallel to said right of way line to the west line of lot eight (8), thence south along said west line to the place of beginning."

Excepting also that portion of said lots seven (7) and eight (8) deeded by the party of the first part May 6th, 1910, to the Coeur d'Alene & Pend d'Oreille Railway Company for right-of-way, and described as follows, to-wit: "A strip of land fifteen feet in width, being seven and one-half (7½) feet on each side of the center line of the spur track of the Coeur d'Alene & Pend d'Oreille Railway Company in said lots seven (7) and eight (8), said center line being more particularly described as follows, to-wit: Beginning at a point on the center line of the main

track of the Coeur d'Alene & Pend d'Oreille Railway Company thirty-nine (39) feet northwesterly from the intersection of said center line with the west line of said section eleven (11), and running thence in an easterly and northeasterly direction along a line curving to the left with a radius of 942.3 feet for a distance of 102 feet; thence along a line curving to the left with a radius of 359.3 feet for a distance of 543.5 feet; thence in a straight line for a distance of 410 feet.

Lot sixteen (16) and lot twenty-two (22) in section eleven (11), township 50, N., range 4 W. B. M., excepting the right-of-way of the Coeur d'Alene & Spokane Railway Company, which right-of-way is one hundred feet in width on each side of the center line of the railway of said Coeur d'Alene & Spokane Railway Company as the same was definitely surveyed through, over and across said lots sixteen (16) and twenty-two (22), excepting also that portion of lots sixteen (16) and twenty-two (22) deeded by parties of the first part to Coeur d'Alene & Pend d'Oreille Railway Company, April 22nd, 1910, for right-of-way and described as follows: "A strip of land one hundred feet in width extending southeasterly and northwesterly through lot sixteen (16) in said section eleven (11), township 50 north, range 4 West B. M., said strip of land lying north of and adjoining the right-of-way of the Coeur d'Alene & Spokane Railway Company, also a strip of land one hundred feet in width running in a northwesterly and southeasterly direction through lot twenty-two

(22) in said section eleven (11), township 50, N. R. 4 W. B. M., said strip of land lying on the northeast side of and adjoining the right of way of the Coeur d'Alene & Spokane Railway Company."

All of that part of lot two (2) in section fourteen (14), township 50, N. R. 4 W. B. M., lying west of the right-of-way of said Coeur d'Alene & Spokane Railway Company, excepting that portion deeded by the parties of the first part April 22nd, 1910, to the Coeur d'Alene & Pend d'Oreille Railway Company for right-of-way and described as follows: "All that part of lot two (2) in section fourteen (14) township 50, N. R. 4 W. B. M. lying on the west side of the right of way of the Coeur d'Alene & Spokane Railway Company, excepting that the parties of the first part reserve to themselves and to their assigns all booming rights and privileges in the river and along the river in front of said lot two (2) with the right to attach booms to the shore line of said lot two and also reserve the right to an easement along said shore line for the purpose of traveling back and forth in the management of said booming rights and privileges, said right to be exercised in such manner as to interfere with the railroad as little as possible, provided, however, that the Coeur d'Alene & Pend d'Oreille Railway Company shall have the right to fill the river along the river front to such an extent as may be reasonably necessary to enable them to construct and maintain its railroad between said right of way of the Coeur d'Alene & Spokane Railway Company and the river, and also

the right to protect such fill by rip rap or other necessary means to maintain the same, and provided, further, that if they shall make any fill along the bank of said river as above provided, then the said rights and privileges reserved shall apply to such fill or made ground."

All that part of lot four (4) in section ten (10) township 50, N. R. 4 W. B. M., described as follows, to-wit:

Beginning at a point on the section line between section ten and eleven in said township and range at the high water mark on the north bank of the Spokane River, thence westerly along the said high water mark three hundred twenty-one feet, thence north sixteen and one-half feet, thence running north twenty-seven degrees, fifteen minutes east a distance of 364.1 feet to the south line of the said right of way of the Coeur d'Alene & Spokane Railway Company, thence east along the said south line of said right of way 120.1 feet, more or less, to the east line of said section ten, thence south along the east line of said section ten, to the place of beginning, together with all saw-mill buildings, boiler houses, burners, machine shops, blacksmith shops, lath mills, planing mills, power houses, boiler houses, dry kilns, repair shops, engine houses and other buildings and structures, tracks, engines, boilers, generators, machinery, tools, apparatus, furniture, fixtures, cars, appliances, poles, wires, motors, sidings, switches, rails, bridges, and all other fixtures, machinery, tools and equipment whatsoever not herein specifically de-

scribed, nor or hereinafter, in or upon or about the property hereby conveyed or any part thereof or belonging to the company, and together with any and all other fixtures, machinery and tools whatsoever not herein specifically described, in or that may hereafter be placed in or upon the premises hereby conveyed, or any building or buildings nor or hereafter standing thereon.

Also the right, power and authority in perpetuity to build, construct and maintain piers, piles and piling and stationary booms and chains attached thereto or to the shore, and to store logs within said booms in Lake Coeur d'Alene and the Spokane River along the shore and out into said lake and river of and from and opposite Lots numbered 18, 46, 47 and 7 and 8 of Section 14, Township 50 North of Range 4 West of the Boise Meridian, said described land being a part of the abandoned Fort Sherman military reservation; and all booms, chains, piles, piling and other equipment of every kind and character connected or used with such booms either at the place above mentioned or in the Spokane River at or near the saw-mill plant of the company or used in any manner in connection therewith.

State of Washington,
County of Spokane,—ss.

On this 29th day of February, in the year 1916, before me E. E. Flood, a Notary Public in and for said County and State, personally appeared C. D. Gibbs and S. Katz known to me to be the president and secretary, respectively of the Stack-Gibbs Lumber Company, one of the corporations that executed

the instrument, and acknowledged to me that such corporation executed the same.

(Notarial Seal) (Signed) E. E. FLOOD,
Notary Public in and for the State of Washington,
residing at Spokane.

State of Washington,
County of Spokane,—ss.

On this 29th day of February, in the year 1916, before me, E. E. Flood, a Notary Public in and for said County and State, personally appeared William Huntley and William H. Kaye known to me to be the president and assistant secretary, respectively, of the Mechanics Loan & Trust Company, one of the corporations that executed the instrument, and acknowledged to me that such corporation executed the same.

(Notarial Seal) (Signed) E. E. FLOOD,
Notary Public in and for the State of Washington,
residing at Spokane.

State of Washington,
County of Spokane,—ss.

On this 29th day of February, in the year 1916, before me E. E. Flood, a Notary Public in and for said County and State, personally appeared B. G. Nelson and S. Katz, known to me to be the president and secretary, respectively, of the Dryad Lumber Company, one of the corporations that executed the instrument, and acknowledged to me that such corporation executed the same.

(Notarial Seal) (Signed) E. E. FLOOD,
Notary Public in and for the State of Washington,
residing at Spokane.

State of Washington,
County of Spokane,—ss.

On this 29th day of February, in the year 1916, before me, E. E. Flood, a Notary Public in and for said County and State, personally appeared William Huntley and William H. Kaye, known to me to be the president and assistant secretary, respectively, of the Mechanics Loan & Trust Company, one of the corporations that executed the instrument, and acknowledged to me that such corporation executed the same.

(Notarial Seal) (Signed) E. E. FLOOD,
Notary Public in and for the State of Washington,
residing at Spokane.

The undersigned creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company to the amounts set opposite their names, hereby become parties to and agree to all the terms and conditions of the foregoing deed of trust.

Dated February 1st, 1916.

Creditors.	*Amount of Claim.*
Merrill, Cox & Co.	$221,250.00
By H. J. Aaron, its attorney.	
Fort Dearborn National Bank	107,000.00
By H. J. Aaron, its attorney.	
I. F. Searle	55,000.00
First National Bank, Lincoln, Nebr.	12,500.00
By I. F. Searle.	
The Exchange National Bank of Spokane	6,000.00
By Edwin T. Coman, Pres.	
Shoshone Lumber Co.	5,000.00
E. L. Carpenter, Pres.	

Idaho Timber Co.	60,000.00
E. L. Carpenter, Treas.	
S. H. Hess	30,000.00
J. H. Stack	110,000.00
Genevieve Hess Tolerton	20,465.56
Mrs. M. A. Gibbs	12,725.00

(Endorsed): Filed Feby. 19, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

No. 905

MOTION TO STRIKE PETITION OF EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON

Comes now, W. A. Armstrong, Trustee, by Robert Weinstein, his attorney, and now come Merrill Cox & Company and the Fort Dearborn National Bank, By Elmer H. Adams, their attorney, I. F. Searle and Minnie A. Gibbs by H. W. Canfield, their attorney, and S. H. Hess, Genevieve Hess Tolerton, the Idaho Timber Company and the Shoshone Lumber Company, by R. J. Danson, their attorney, who join in the motion to strike the petition of the Exchange National Bank of Spokane, Washington, from the records and files in this case, with the Trustee.

All of the foregoing parties move the court to strike the petition of the Exchange National Bank of Spokane, Washington, filed this 19th day of February, 1917, from the records and files of this court, for the following reasons and upon the following grounds:

First, it appears from said petition that the said petitioner has not any interest or claim in said estate;

Second, it appears from said petition that said petitioner is not asking any relief whatsoever on its behalf but that it is a mere interloper without any interest whatsoever in the estate of the Stack-Gibbs Lumber Company, as appears from said petition;

Third, it does not appear from said petition when the said Exchange National Bank delivered the notes referred to in said petition to the Mechanics Loan & Trust Company;

Fourth, that under the bankruptcy act only parties who have provable claims can appear and participate in the proceedings and that the petition fails to show that the petitioner has any provable claim whatsoever in this estate.

ROBERT WEINSTEIN,
Attorney for the Trustee.

ELMER H. ADAMS,
Attorney for Merrill Cox & Co., and Fort Dearborn National Bank.

H. W. CANFIELD,
Attorney for I. F. Searle and Minnie A. Gibbs.

DANSON, WILLIAMS & DANSON,
Attorneys for S. H. Hess, Genevieve Hess Tolerton, Idaho Timber Company and Shoshone Lumber Company.

Motion denied in open court this 19th day of February, 1917.

L. L. LEWIS, Referee.

Filed Feb. 19, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

ANSWER TO PETITION OF EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON

Comes now W. A. Armstrong, Trustee, by Robert Weinstein, his attorney, and the Fort Dearborn National Bank and Merrill Cox & Company by Elmer H. Adams their attorney, I. F. Searle and Minnie A. Gibbs by W. H. Canfield, their attorney and S. H. Hess, Genevieve Hess Tolerton, the Idaho Timber Company and the Shoshone Lumber Company by R. J. Danson, their attorney, and for answer to the petition of the Exchange National Bank, Spokane, Washington, answering says:

1st. That the respondent save any and all objection and exception which they may have to the many errors and imperfections in said petition set forth;

2d. That the respondent admits that the Exchange National Bank of Spokane was and now is a National Bank as averred;

3d. These respondents admit that the Mechanics Loan & Trust Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and was authorized on the 3d day of January, 1916, to transact business in the State of Idaho;

4th. These respondents admit that the Stack-Gibbs Lumber Company was a corporation carrying on the lumber business at Gibbs, Idaho, but as to what representations were made to the Exchange

National Bank by one C. D. Gibbs, these respondents deny that they have any knowledge or information thereof sufficient to form a belief and therefore respondents deny the same;

5th. These respondents admit that the contract referred to as Exhibit A in said petition was signed by the parties therein named;

6th. These respondents neither admit nor deny the allegations in paragraphs four and five of said petition as to the construction of certain paragraphs of said contract but refer to said contract itself;

7th. These respondents deny that the Mechanics Loan & Trust Company advanced or caused to be advanced to said Stack-Gibbs Lumber Company the sum of One Hundred Thousand Dollars or any part or portion thereof and deny that the said Exchange National Bank advanced any money whatsoever at the request of these respondents or either of them or the signers or the parties who signed said contract, Exhibit A, and these respondents further answering aver that any attempt to alter, amend, change, or extend the terms of said contract, Exhibit A, by any alleged contemporaneous oral agreement or arrangement is incompetent and immaterial;

8th. These respondents deny that the Mechanics Loan & Trust Company or the petitioner is entitled to any lien of any kind or character on any of the properties of effects or any of the moneys belonging to the Stack-Gibbs Lumber Company and now in the possession of the Trustee, or is entitled to the dividends of any of the parties who signed said Exhibit A.

9th. These respondents further deny that the petitioner delivered to the Mechanics Loan & Trust Company the said promissory notes referred to in said petition and authorized said Trust Company to file a claim herein in the manner and form of its amended claim;

10th. These respondents deny that the Mechanics Loan & Trust Company is entitled to the preference as prayed for or to the dividends as prayed for.

These respondents aver that the notes set forth in the petition are simply renewals of notes theretofore given for like amounts and the original notes when given were made by the Stack-Gibbs Lumber Company payable to the Mechanics Loan & Trust Company and the Mechanics Loan & Trust Company endorsed said notes without recourse and said notes were then delivered to said Exchange National Bank of Spokane, Washington, and the said Exchange National Bank upon the receipt of said notes did thereupon advance to the Stack-Gibbs Lumber Company and to no other party whomsoever the amount of said notes less the discount thereon and that the Mechanics Loan & Trust Company never received any consideration of any kind or character from the Exchange National Bank nor did it ever pay any consideration of any kind or character to the Stack-Gibbs Lumber Company for or on account of said original notes or any of them and upon said original notes maturing, renewal notes, being the notes set forth in the petition, were executed by the Stack-Gibbs Lumber Company and all the renewal notes

which were made payable to the Mechanics Loan & Trust Company were endorsed by the Mechanics Loan & Trust Company without recourse and delivered to the Exchange National Bank and said Exchange National Bank never paid any consideration of any kind or character to said Mechanics Loan & Trust Company nor did the said Mechanics Loan & Trust Company ever pay any consideration of any kind or character to the Stack-Gibbs Lumber Company for or on account of any of said renewal notes but all the consideration therefor passed directly from the Exchange National Bank of Spokane, Washington, to the Stack-Gibbs Lumber Company.

These respondents therefore deny that the Mechanics Loan & Trust Company is entitled to any preference of any kind or character as averred and aver that the owner of said notes is the Exchange National Bank of Spokane, Washington, and that it is not entitled to any lien of any kind or character upon any of the assets of the Stack-Gibbs Lumber Company or of any moneys now in the hands of the Trustee or to any dividend or dividends payable to any other creditor or creditors whomsoever and these respondents deny that the Exchange National Bank or the Mechanics Loan & Trust Company are entitled to any relief whatsoever and pray that the petition of said Exchange National Bank be dismissed at the cost of the petitioner.

W. A. ARMSTRONG,

Trustee.

ROBERT WEINSTEIN,

Attorney for Trustee.

ELMER H. ADAMS,
Attorney for Fort Dearborn Nat'l Bk. and Merrill Cox & Company.

H. W. CANFIELD,
Attorney for I. F. Searle and Minnie A. Gibbs.

DANSON, WILLIAMS & DANSON,
Attorney for S. H. Hess, Genevieve Hess Tolerton, Idaho Timber Co. & Shoshone Lumber Co.

State of Idaho,
County of Kootenai,—ss.

W. A. Armstrong, duly qualified and acting trustee of the above named corporation, being first duly sworn, deposes and says that he has read the above and foregoing answer and the same is true as he verily believes.

W. A. ARMSTRONG.

Subscribed and sworn to before me this 20th day of February, A. D. 1917.

LAWRENCE L. LEWIS,
Referee in Bankruptcy.

(Endorsed): Filed Feb. 20, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

ORDER ALLOWING CLAIM OF THE MECHANICS LOAN & TRUST COMPANY.

The amended proof of claim of the Mechanics Loan & Trust Company, a corporation (to which is attached its original proof of claim), and the petition of the Exchange National Bank of Spokane, Washington, submitted through their attorneys, Post, Russell, Carey & Higgins, together with the objec-

tions thereto, submitted by W. A. Armstrong, trustee herein; and, Merrill Cox & Company, Fort Dearborn National Bank, S. H. Hess, I. F. Searle, Mamie A. Gibbs, Genevieve H. Tolerton, Idaho Timber Company, and the Shoshone Lumber Company, by and through their respective attorneys, Robert Weinstein, Danson, Williams & Danson, H. W. Canfield and Elmer H. Adams; and, after a careful consideration of the evidence, both oral and documentary, and after argument of counsel both oral and upon brief, the Court being fully advised in the premises:

IT IS ORDERED that the several objections to the amended proof of claim of the Mechanics Loan & Trust Company be, and the same are, each and all, hereby overruled;

IT IS FURTHER ORDERED that the claim of the Mechanics Loan & Trust Company, the claimant herein, be, and the same is, allowed in the sum of $101,162.91; for the reason that by virtue of the terms and conditions of the trust agreement, upon which this claim is based, and in the light of the evidence, said agreement became effective as to the foregoing objecting creditors who signed it. The evidence discloses that the sum of $639,940.56 was considered by the signers of said trust agreement to be, at least, 90 per cent of the indebtedness of said bankrupt at the time of the signing of said trust agreement; and, that when Mrs. Genevieve H. Tolerton signed, then 90 per cent of the said indebtedness of the said bankrupt would have signed; that is, when Mrs. Tolerton signed, then the total signed indebtedness would aggregate the said sum of $639,940.56.

Mrs. Tolerton signed the said trust agreement, according to the mutual understanding of all parties to it. It must, therefore, be apparent that said trust agreement became effective as to all parties to it with the signature of Mrs. Tolerton. IT IS ALSO APPARENT from the evidence that Sigmund Katz was not only to become a stockholder and an officer of the Stack-Gibbs Lumber Company, the bankrupt, herein; but, was, also, to represent the Mechanics Loan & Trust Company, the said claimant, trustee, under said trust agreement. In other words, he was to represent all interests under said trust agreement. The said Mechanics Loan & Trust Company, therefore, took possession of the property of the Stack-Gibbs Lumber Company by and through its representative the said Katz; and, in so far as the signers of said trust agreement are concerned fully complied with Section 3170 of the Idaho Revised Codes as to change of possession of the trust estate. It would appear, therefore, that the signing objectors have no just right to complain.

IT IS FURTHER ORDERED that the Mechanics Loan & Trust Company, the claimant herein, be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons, or corporations signing said trust agreement, to-wit: Merrill Cox and Company; Fort Dearborn National Bank; I. F. Searle, First National Bank of Lincoln, Nebraska; Exchange National Bank of Spokane, Washington; Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton

and Minnie A. Gibbs, until the full amount of $101,-162.91 is paid; said payment to be made before any moneys, whatsoever, of said estate be paid in liquidation or satisfaction as dividends or otherwise, of any of the claims of the above-named creditors and signers of said trust agreement, or any of them; that is that said sum be a first lien upon the dividends of said signing creditors until the same is fully paid.

IT IS FURTHER ORDERED that the claim of the Mechanics Loan & Trust Company, that said amount, to-wit, the sum of $101,162.91, be adjudged a first lien upon all of the assets of said bankrupt be, and same is hereby denied; for the reason that the creditors of said bankrupt who did not sign said trust agreement are not bound thereby.

AND IT IS FURTHER ORDERED that the petition of the Exchange National Bank of Spokane, Washington, be and the same is, hereby granted with this modification, to-wit: that all sums hereinafter found to be due and payable to said Mechanics Loan & Trust Company shall be paid jointly with said Exchange National Bank of Spokane, Washington. This order is thus made by reason of the fact that there is no contention as between the bank and the trust company with reference to the receipt of the money; and, further, the evidence discloses that it was understood by the signers of the trust agreement under consideration that the Mechanics Loan & Trust Company, the trustee under said agreement, possessed but small capital and that the bank would advance whatever money was nec-

essary to the proper execution of the trust not to exceed in amount the sum of $100,000.00. This, the bank did to the extent of said sum.

As to where the Meachnics Loan & Trust Company procured the money with which to carry out its trust under said trust agreement, or how it procured the same, is of no consequence here. And, especially is this true with reference to the signers of said trust agreement, the objectors, herein. Section 2 of the Trust Agreement is very broad with reference to the discretion to be given the trustee in the prosecution and management of the trust imposed; and, it would appear that the provision in said trust agreement "may use any and all of the trust estate as it thinks best" would sufficiently authorize and empower said trust company (if in the trustee's discretion, it thought best) to accept the notes of its *cestui qui* trust,—in other words, to borrow the necessary funds with which to carry out the said trust from the trust estate. This course was followed and the notes given by the Stack-Gibbs Lumber Company to its trustee, the said Mechanics Loan & Trust Company, were endorsed by said trustee, "without recourse", to the said Exchange National Bank of Spokane, Washington. The mere fact that said notes were endorsed "without recourse" to the bank would appear not to militate against the propriety or the legality of the transaction when the evidence discloses that the signers of said trust agreement, now the objectors fully understood that said bank would advance the necessary funds to carry into effect the trust.

Secombe v. Steele, 20 Howard, 94;
Washington & Idaho R. R. Co. vs. Coeur d'Alene R. R. Co., 160 U. S., 77;
Utley vs. Donaldson, 94 U. S., 29;
Bailey vs. R. R. Co., 17 Wallace, 96;
Joy vs. St. Louis, 138 U. S., 1;
Insurance Co. vs. Dutcher, 95 U. S. 269;
Randolph vs. Scruggs, 190 U. S., 533.

The purpose of the modification is to extend due and proper protection to both the bank, who advanced the money, and the trust company and its trust estate, who accepted it, and received the benefit thereof. The doctrine of subrogation does not appear to be applicable here.

Done at Coeur d'Alene, Idaho, in said District, this 28th day of May, A. D. 1917.

LAWRENCE L. LEWIS,
Referee in Bankruptcy.

(Endorsed): Filed May 28, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

PETITION FOR REVIEW.

To L. L. Lewis, Esq., Referee in Bankruptcy:

Your petitioners respectfully show:

1. That your petitioners are each a creditor of said Stack-Gibbs Lumber Company, the above named bankrupt, and each of said creditor's claim has been duly allowed herein.

2. That on the 28th day of May, 1917, an order, a copy of which is hereto annexed, was made and en-

tered herein; that such order was and is erroneous in that:

(a) Said referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank, or by either of them, to the dividends due or which should be found to be due and declared to these petitioners or to either of them or to determine any rights whatsoever to the dividends to be declared herein as between the said claimant and these said petitioners.

(b) Said referee committed error in admitting any evidence of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, E. L. Carpenter, Bob Wetmore, I. F. Searle, C. D. Gibbs and H. J. Aaron, or any of them, and in admitting evidence of any conversations had by and between said E. T. Coman and either of said persons, or in the presence of any of said persons relative to what was said about what should constitute ninety (90%) per cent of the creditors of said bankrupt, relative to what was said about when said contract should take effect, relative to what was said as to what should be done under said contract, relative to what was said about Sigmund Katz coming to Spokane, or Gibbs, Idaho, relative to what was said about what he should do relative to what was said about the financial condition of the Mechanics Loan & Trust Company, and relative to what was said about the Exchange National Bank advancing any money or funds.

(c) Said referee committed error in basing his decision upon said incompetent testimony.

(d) Said referee committed error in refusing to sustain the objections made by your petitioners to the claim of the Mechanics Loan & Trust Company.

(e) Said referee committed error in refusing to sustain the objections made by your petitioners to the filing and allowance of the claim of the Exchange National Bank.

(f) Said referee committed error in overruling the several objections to the amended proof of claim of the Mechanics Loan & Trust Company.

(g) Said referee committed error in allowing the claim of the Mechanics Loan & Trust Company in the sum of $101,162.91.

(h) Said referee committed error in allowing the claim of the Mechanics Loan & Trust Company for any sum.

(i) Said referee committed error in finding that the evidence discloses that the sum of $639,940.56 was considered by the signers of said trust agreement to be at least ninety (90%) per cent of the indebtedness of said bankrupt at the time of signing said trust agreement, and that when Genevieve H. Tolerton signed, then ninety (90%) per cent of the said indebtedness of said bankrupt would have signed.

(j) Said referee committed error in finding that Sigmund Katz was not only to become a stockholder and an officer of the Stack-Gibbs Lumber Company, but was also to represent the Mechanics Loan & Trust Company.

(k) Said referee committed error in finding that said Mechanics Loan & Trust Company took possession of the property of the Stack-Gibbs Lumber Company by and through its representative, the said Sigmund Katz.

(l) Said referee committed error in finding that in so far as the signers of said trust agreement are concerned, Section 3170 of the Idaho Revised Codes as to charge of possession was fully complied with by said Mechanics Loan & Trust Company.

(m) Said referee committed error in ordering and adjudging that the Mechanics Loan & Trust Company be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons or corporations signing said trust agreement, to-wit: Merrill Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Lincoln, Nebraska; Exchange National Bank of Spokane, Washington; Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs until the full amount of $101,162.91 was paid, and in ordering and adjudging that said sum be declared to be a first lien upon the dividends of said respective parties.

(n) Said referee committed error in granting the petition of the Exchange National Bank of Spokane, Washington, with the modification that all sums hereafter found to be due and payable to Mechanics Loan & Trust Company should be paid jointly with said Exchange National Bank of Spokane, Washington.

(o) Said referee committed error in finding that the evidence discloses that it was understood by the signers of the trust agreement under consideration that the Mechanics Loan & Trust Company possessed but small capital, but that the said Exchange National Bank would advance whatever money was necessary to the proper execution of the trust, not to exceed the sum of $100,000.00, and in finding that said bank did this to the extent of said sum.

(p) Said referee committed error in allowing said claim of the Mechanics Loan & Trust Company in that the said claimant, Mechanics Loan & Trust Company is not the owner of the notes therein mentioned, and the evidence shows it has no claim whatsoever against the said bankrupt.

(q) Said referee committed error in allowing the claim of said Mechanics Loan & Trust Company in that the said claimant, Mechanics Loan & Trust Company, did not loan, advance or furnish to the above named bankrupt any sum of money whatsoever.

(r) Said referee committed error in allowing and ruling that the alleged contract attached to the claim of said Mechanics Loan & Trust Company as Exhibit "A" was signed by ninety (90%) per cent in amount of the indebtedness of the said bankrupt, in that the said alleged contract never became operative by reason of the failure to secure the signature of ninety (90%) per cent in amount of said creditors.

(s) Said referee committed error in holding and deciding that said trust agreement was and is valid.

WHEREFORE, your petitioners pray that the

said order of the referee may be reviewed by the Honorable Judge of this Court, and that said order be adjudged erroneous and void; that the referee certify the said questions to the court for that purpose and send up with his certificate all of the testimony taken on said issues.

Dated this 6th day of June, 1917.

W. A. ARMSTRONG,
Trustee in Bankruptcy.
By Robert Weinstein, his Attorney.
I. F. SEARLE,
By H. W. Canfield, his Attorney,
MERRILL COX & COMPANY,
By Ernest H. Adams and H. L. Cohn, its Attorneys.
S. H. HESS,
IDAHO TIMBER COMPANY,
SHOSHONE LUMBER COMPANY,
By Danson, Williams & Danson, their Attorneys.

(Duly verified.)

(Copy of order allowing claim of the Mechanics Loan & Trust Company, hereto attached.)

(Endorsed): Filed June 7, 1917. L. L. Lewis, Referee.

(Title of Court and Cause.)

REPORT OF REFEREE IN BANKRUPTCY ON AN ORDER ALLOWING THE CLAIM OF THE MECHANICS LOAN & TRUST COMPANY IN THE SUM OF $101,162.91.

To the Honorable Frank S. Dietrich, District Judge:

I, Lawrence L. Lewis, referee in bankruptcy, in

charge of the above-entitled proceedings, do hereby certify:

1.

That in the course of said proceedings, on, to-wit, the 28th day of May, 1917, an order was made and filed herein, allowing the claim of the Mechanics Loan & Trust Company in the sum of $101,162.91.

2.

That on, to-wit, the 7th day of June, 1917, W. A. Armstrong, Trustee herein; and, I. F. Searle, Merrill Cox & Company, S. H. Hess, Idaho Timber Company, and the Shoshone Lumber Company, creditors of said bankrupt, feeling aggrieved thereat, filed, herein, their petition for review, which said petition was duly granted.

3.

That a full, true and correct summary of the proceedings upon which said order was made is as follows, to-wit:

That on, to-wit, the 27th day of December, 1916, the Proof of Claim of the Mechanics Loan & Trust Company was duly filed herein; that thereafter, on, to-wit, the 6th day of January, 1917 (by leave of court), the amended claim of the said Mechanics Loan & Trust Company was duly filed in said cause; that thereafter, on, to-wit, the said 8th day of January, 1917, W. A. Armstrong, trustee, herein, Merrill Cox & Company, Fort Dearborn National Bank, S. H. Hess, et al., filed in said cause their objections to the allowance of said claim; that thereafter, on, to-wit, the 19th day of February, 1917, the Petition of the Exchange National Bank of Spokane,

Washington, was filed herein; that thereafter, on, to-wit, the said 19th day of February, 1917, Motion to Strike the Petition of Exchange National Bank of Spokane, Washington, was duly filed, and in open court overruled; that thereafter, on, to-wit, the 20th day of February, 1917, the trustee herein, filed his answer to the petition of the Exchange National Bank of Spokane, Washington; that thereafter, in said course of proceedings said pleadings came regularly on to be heard, and after a careful consideration of the evidence, both oral and documentary, and after argument of counsel, the consideration of briefs, the Court being fully advised in the premises, the said order of the 28th day of May, 1917, was duly made and filed in said cause, to which said order, the petitioners, herein, duly excepted, and submit that such order was and is erroneous in certain particulars, which said particulars are each and all fully set forth in said petition for review.

THE PRECISE QUESTIONS SUBMITTED for decisions are these:

1. Under the provisions of the trust agreement now being considered, and in the light of the evidence (no fraud appearing), did said trust agreement become effective as to those who signed it? That is, did the contemplated "90 per cent in amount of indebtedness of the Lumber Company" sign said trust agreement?

2. If said trust agreement became effective as to those who signed it, did the Mechanics Loan & Trust Company, the trustee, thereunder, take such possession of the trust estate as to comply (either wholly or

substantially) with the provisions of Section 3170 of the Idaho Revised Codes, with reference to change of possession?

3. Under the provisions of the trust agreement (particularly Sections 1 and 2), and in view of the evidence, did the Mechanics Loan & Trust Company, as such trustee, possess the power and the authority to *proceed as it did proceed* to raise the $100,000.00 with which to meet, speedily, the requirements of the trust imposed? That is, should those signing said trust agreement now be heard, in equity, to complain of the *particular method* employed by the trust company to procure the funds necessary to carry into effect the provisions of the trust?

4. Is the order here under review correct in point of law?

I hand up, herewith, for the information of the Judge, the following records and files, to-wit:

1. Petition for Review.

2. Order allowing claim of the Mechanics Loan & Trust Company;

3. Proof of Claim of the Mechanics Loan & Trust Company;

4. Amended Proof of Claim of the Mechanics Loan & Trust Company;

5. Objections of W. A. Armstrong, et al., to the allowance of said claim;

6. Petition of Exchange National Bank of Spokane, Washington;

7. Answer of trustee to Petition of Exchange National Bank of Spokane, Washington.

8. Record of Proceedings, and Copy of Exhibits.
9. Briefs of counsel for trustee; also, of Mechanics Loan & Trust Company.

I FURTHER CERTIFY that the above and foregoing are all the papers, records and files considered or pertaining to this review.

Done at Coeur d'Alene, Idaho, in said District, this 9th day of June, A. D. 1917.

LAWRENCE L. LEWIS,
Referee in Bankruptcy.

(Endorsed): Filed June 21, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 905

DECISION IN MATTER OF REVIEW OF ORDER ALLOWING CLAIM OF MECHANICS LOAN & TRUST COMPANY.

DIETRICH, DISTRICT JUDGE:

The most serious question is whether the trust agreement was signed by a sufficient number of creditors to give it validity. The referee did not find that as a matter of fact the signatures aggregated ninety per cent of the total indebtedness, nor do I think that if we regard the instrument alone, apart from the practical construction placed thereon by the parties in interest, it would be possible to make such a finding. While we might very reasonably exclude certain of the items embraced in the $871,853.27, which the petitioners here contend is the correct footing, we cannot consistently exclude enough

to give the required ratio between the entire remaining indebtedness and that represented by the signatory creditors. But I am satisfied that all the parties acted upon the assumption that with the signature of Mrs. Tolerton the condition was fully complied with, and that the practical construction placed upon a writing at the time of and subsequently to its execution by the parties in interest may, and ordinarily should, be adopted by the court. From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets, but that its credit was exhausted, and that it was doubtful whether it could meet its next pay rolls. The parties who are now objecting to the recognition of the trustee's claim were large creditors, whose interests were likely to be prejudiced in case of a receivership or bankruptcy proceeding. They were desirous that the debtor should continue to appear to be a solvent, going concern; hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. They discussed the signatures that could probably be obtained, and made provision for taking up and satisfying intractable claims up to a certain amount. So far as appears, the trustees and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6,000.00, and was relatively unimportant. I am wholly at a loss to understand how the trustee could have had any strong motive of self-interest

such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good morals. I have no doubt that he understood that the condition had been fully complied with, and assumed that the trustee would have the protection afforded by the trust agreement. Surely under the circumstances it was not contemplated that the trustee was at its peril to determine for itself whether the requisite ninety per cent had signed. For example, there appear to have been some controverted claims and other claims not disclosed by the records of the debtor. Was it to wait until the disputed claims were litigated or otherwise adjusted, or until the statute of limitations had fully run, in order that it might be sure that there was no undisclosed indebtedness, before it could safely proceed to execute the trust? When we come to examine the agreement we find that its spirit is out of accord with such a view. In paragraph nine it

is expressly provided that in the conduct and management of the trust estate the trustee should be reimbursed out of the estate for any claim which might be asserted against it, for damage done to third persons, even though such damage might have been caused by the negligence or misconduct of the trustee's officers, agents and employes. And in the fifteenth paragraph it is provided that if the trustee exercised reasonable care in the selection of its agents and employes it should not be held liable for any loss or damage from their negligence or default. Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000.00, or any considerable portion thereof, without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advan-

tage, acted under the provisions of the agreement, be heard to say that it never went into effect.

When in the light of the surrounding circumstances and the conduct of the parties we consider the several items relied upon by the petitioners as constituting part of the indebtedness, we find little difficulty in eliminating most of them. It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane, only $6,000.00. Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegal or immoral, it still remains true that $6,000.00 was the maximum actual indebtedness, and that is the only fact with which we are here concerned.

There was in truth no overdraft at the Exchange National Bank of Coeur d'Alene. While in a sense the floating checks upon this bank aggregating $15,-431.07 represented indebtedness, they were issued in the expectation that current deposits would be sufficient to take care of them as they were presented. Such a species of indebtedness would naturally fluctuate from day to day, if not from hour to hour, and it is not to be assumed that the parties contemplated that it would be taken into account.

The debtor was under contract to deliver to divers persons lumber and logs to the aggregate value of $79,852.62. From one point of view, of course, these obligations are the equivalent of an indebtedness in the strict sense of the word, but the trust agreement itself bears strong internal evidence that such obligations were not intended to be taken into

consideration as a part of the "indebtedness." Express reference is made to the largest of such contracts, one covering lumber of the value of $32,-948.40, with a provision for its specific performance by the delivery of the lumber called for. So far as appears, the debtor was having no trouble in meeting obligations of this character. It had sufficient assets, but its embarrassment was due to its inability to realize money thereon. Apparently it was able to meet its obligations under these contracts—which required no payments in money—and was ready to do so.

There is also an item of $19,500.00 of indebtedness due to one Yeomans, who held lumber as security. Apparently the parties intended to treat secured claims as being in a distinct class. For example, there were also obligations secured by a trust deed, but no one is contending that they should be considered in computing the indebtedness covered by the trust agreement; and yet in a very real sense, of course, they constitute indebtedness.

Most difficult perhaps of all are the numerous items, disputed and undisputed, amounting to approximately $40,000.00, which did not appear upon the debtor's books, but, as already suggested, it is hardly reasonable to suppose that anyone thought that the trustee must, at its peril, find out whether the debtor owed unrecorded debts. It is quite incredible that anyone could have been found willing to accept the trust upon such terms.

Thus far I have not referred to contention made by counsel "for creditors whose debts were incurred"

by the trustee. So far as I have been able to discover, the record before me does not disclose the amount or nature of such debts, or the names of the claimants. The contention in brief is, that, whether or not the trust agreement be deemed to have become binding upon the creditors who signed the same, it still remains true that it was signed by the trustee and by the debtor, and inasmuch as the latter undoubtedly knew that the trustee was proceeding upon the assumption that it was in effect, and was advancing moneys for its use and benefit upon such assumption, it is estopped from denying that the agreement became effective, and it, at least, is bound by the terms thereof. That being the case, it follows, so it is argued, that the trustee has a preferential claim against the estate for all moneys advanced, for the reason that the agreement was executed and went into effect more than four months prior to the adjudication, and being neither contrary to public policy nor violative of any law of the State of Idaho, it effectively operated to give to the trustee an equitable lien on the entire estate, and that such estate was taken over by the trustee in bankruptcy for the benefit of the general creditors, not only those who signed the agreement but all others, subject to such a lien. But as I view it, the record is not in a condition to warrant the consideration of this contention at the present juncture. Neither the creditors referred to in this brief, nor the trustee, is complaining of the order under review, by which the trustee was recognized as having a sort of equitable lien only upon the dividends to which

the signatory creditors may become entitled. Besides, as I understand, the general creditors other than those who signed the trust agreement have neither been made parties nor appeared in this proceeding, and obviously a recognition of the contention that the whole estate came into the bankruptcy court charged with this lien would prejudiciously affect the claims of such other creditors.

As to the question whether or not the trustee ever took actual possession of the property as directed by the trust agreement, I find upon examination of the record that just such possession was taken as was doubtless contemplated by the parties. In one aspect it is true the possession was colorable more than real, and my first impression was that the trustee had treated its obligations in this respect flippantly, if not in bad faith, but when I come to analyze the record I find that it was clearly the intention of the parties signing the agreement that as little notoriety as possible be given to the transaction, and that therefore it was desired by all that the trust deed be withheld from the records until an emergency should arise making it necessary to record it, and that insofar as practicable the trustee should keep itself in the background. Any doubt which might otherwise exist is dispelled by the "side agreement" or direction to the trustee, dated February 1, 1916, and introduced as Exhibit 39. Section 21 of the agreement itself provides that the agreement should not become effective until one Sigmund Katz, of Chicago, should be elected secretary and treasurer and a director of the debtor. But it should not be

seriously suggested that anyone ever intended that Katz was to represent the interests of the debtor. He was undoubtedly there for the purpose of representing the creditors, and especially these objecting creditors, for it is provided that "said Katz, or any other person that the majority in amount of the creditors of the lumber company (the debtor) who shall sign the within instrument, shall name, shall be elected and retained as such director and officer of such lumber company * * until the trust created by the within instrument shall be terminated." It is very plain that the desire was that to the public at large the debtor should have the appearance of carrying on the business, and that, as stated in the "side agreement," as little publicity as possible should be given to the fact that its property had passed into the control of a trustee. Katz, being a member of the board of directors, and being the secretary and treasurer of the company, could gaurd against any precipitate action attempted by the debtor, until the trustee could be notified and could record the agreement and assert its exclusive right of control under the terms thereof. Katz was to be in the active management of the property, and while thus having his hand upon the throttle of the machinery of the debtor corporation he formally acknowledged himself to be the agent and representative of the trustee. It is futile now to say that the trustee violated its obligations to the creditors because it kept from the general public knowledge of its relations to the property, and of Katz's relation to it. It was undoubtedly doing precisely what the creditors wanted it to do in this respect.

The discussion has perhaps already exceeded reasonable bounds, and it is not necessary that it should be further prolonged. I have examined the other questions of fact and of law discussed in the oral argument and in the exhaustive briefs which have been filed, but upon consideration they do not impress me as being of sufficient merit to warrant a reversal or modification of the referee's order. Accordingly it will be affirmed.

Filed July 26, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 905

ORDER AFFIRMING THE REFEREE'S ORDER OF MAY 28, 1917, ALLOWING THE CLAIM OF MECHANICS LOAN & TRUST COMPANY.

After due consideration of the arguments and briefs on the review of the order of the Referee in Bankruptcy in the above entitled court and cause made and entered on the 28th day of May, 1917, at Coeur d'Alene, Idaho, allowing the claim of the Mechanics Loan & Trust Company, it is hereby ORDERED that the said order of the said Referee be and the same is hereby affirmed.

Dated this 6th day of August, A. D. 1917.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Aug. 6, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 905

PETITION FOR SUPERVISION AND REVISION.

To the Honorable Judges of the Circuit Court of Appeals of the Ninth District:

Your petitioners, W. A. Armstrong, Trustee in Bankruptcy, I. F. Searle, Minnie A. Gibbs, and Merrill, Cox & Company, feeling themselves aggrieved by the orders, judgments and proceedings herein referred to and described, hereby petition the Court to superintend and revise the said orders and judgments, and in that connection and to that end, your petitioners respectfully show as follows:

I.

That W. A. Armstrong is the duly appointed, qualified and acting Trustee in Bankruptcy herein; that Merrill Cox & Company is a corporation, having its principal place of business in the City of Chicago, Cook County, Illinois; that Minnie A. Gibbs is a resident of Spokane, Spokane County, Washington, and I. F. Searle is a resident of Lincoln, Lancaster County, Nebraska. That each of said petitioners are creditors of Stack-Gibbs Lumber Company, the above entitled bankrupt, who was duly adjudged a bankrupt on both the twenty-ninth day of July, 1916, and the third day of August, 1916, by the District Court of the United States for the District of Idaho, Northern Division, and that each of said petitioner have, in the manner provided by law, herein duly filed their proofs of claim.

II.

That after such adjudication the following proceedings were had in the case of said bankrupt, which have resulted prejudicial, as your petitioners verily believe, to the legal rights and remedies of your petitioners:

(a) That heretofore and on to-wit: the sixth day of January, 1917, the Mechanics Loan & Trust Company, a corporation, filed with the Referee in Bankruptcy, before whom this estate was pending, a pretended amended proof of claim against the bankrupt, wherein the said Mechanics Loan & Trust Company claimed an indebtedness from the bankrupt in the sum of one hundred one thousand, one hundred sixty-two dollars and ninety-one cents ($101,162.91) and claimed that the consideration for the debt was that on or about February first, 1916, the bankrupt, being engaged in manufacturing lumber and in the general business of logging lumber and allied products, represented that the assets of the bankrupt and its associate corporations greatly exceeded the indebtedness that it owed but that it was unable to secure the means to pay the indebtedness that was then due and it was agreed between various creditors of said corporation that a plan be adopted for realizing upon the property of the bankrupt and paying its debts, and accordingly an agreement was entered into between various creditors, of which your petitioners were among, which your petitioners now set forth in its entirety, that the court may be properly advised:

This indenture, made this 1st day of February, in the year of our Lord, One Thousand Nine Hundred and Sixteen, by and between Stack-Gibbs Lumber Company, a corporation organized under the laws of Michigan, hereinafter referred to as the "Lumber Company," Dryad Lumber Company, a corporation organized under the laws of Washington, hereinafter referred to as the "Mill Company," C. D. Gibbs, of Spokane, Washington, hereinafter referred to as "Stockholder," and Mechanics Loan & Trust Company, a corporation organized and existing under the laws of Washington, hereinafter known as "Holder of the Trust Deed," parties of the first part, and Mechanics Loan & Trust Company, a corporation organized and existing under the laws of the State of Washington, hereinafter referred to as the "Trustee," a party of the second part and sundry creditors of the Lumber Company, and Mill Company, who have executed this instrument for the purpose of acceding to its terms and becoming bound thereby, who are hereinafter referred to as the "Creditors," party of the third part.

WITNESSETH:

That whereas, the Lumber Company and the Mill Company have heretofore been and are now engaged in the business of logging and the manufacture of lumber and allied products, and as well other business relating thereto, in the course of which business they have incurred indebtedness to divers individuals and corporations.

And whereas, the value of the property of the

Lumber Company and the Mill Company considerably exceeds their indebtedness, but nevertheless they are unable to obtain means to pay the indebtedness due and presently to become due.

And whereas, all the parties hereto are agreed that the plan herein outlined for realizing upon the property of the Lumber Company and the Mill Company and securing money to pay their presently due indebtedness and for satisfying their indebtedness is for the best interests of all concerned, and necessary to be adopted in order to avoid the heavy costs and expenses which would attend upon the realizing upon their property and the settlement of their indebtedness through receivership or bankruptcy proceedings;

Now Therefore, in consideration of the premises hereof and of other good and valuable consideration moving between the parties hereto, the said Stack-Gibbs Lumber Company and the said Dryad Lumber Company do hereby assign, transfer, set over, give, grant, bargain, sell, convey, remise, release and confirm unto the said Mechanics Loan & Trust Company, its successors or assigns, as Trustees as hereinafter set forth, all and singular the hereinafter *set forth, all and singular the hereinafter* described property, to-wit:

(Here was inserted description of various properties.)

To have and to hold to the said Trustee, its successors or assigns, to its and their use forever, but in trust, nevertheless, and for the uses and purposes following, to-wit:

1. The trustee shall forthwith take possession of the trust estate as of an estate in fee simple, and shall have and possess the same power to control, use, manage, and dispose of the same, and to incur all proper expenses in connection therewith, as in its judgment shall seem to the best interest of all the parties hereto, as though it was the absolute owner thereof.

2. The Trustee may, in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company; may operate mills, cut logs, saw timbers, manufacture lumber into various forms, and transact any form of business heretofore conducted by the Lumber Company and Mill Company and for such purposes, or any other purpose which it deems proper and in realizing upon the trust estate, may use any and all of the trust estate as it thinks best, and in carrying on such business it may incur such expense as it thinks necessary to the proper conduct thereof, including necessary maintenance, replacement or supplying of new tools, machinery and apparatus.

3. The Trustee may employ such persons as it deems necessary, officers and employees of the Lumber Company and Mill Company, as well as others, for the proper management, use, enjoyment, and realization upon the trust estate, and may pay persons so employed reasonable compensations.

4. The Trustee shall collect such debts owing to the Lumber Company and Mill Company as are collectible in the exercise of ordinary diligence, and

may take security for, extend time of, compromise, or in any way it thinks proper settle any debts which in its opinion is of doubtful collectibility.

5. The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof, and shall have power to sell and convey any and all of the trust estate at such prices and upon such terms as it considers proper, and its deed or bill of sale shall convey full and complete title to the purchaser free and clear of all right, title, claim or lien of the Lumber Company or of any other party hereto.

6. The Trustee shall receive as compensation, for its services as Trustee hereunder, the sum of Ten Thousand Dollars ($10,000.00), provided the Trusteeship is terminated within two (2) years from the date hereof, and shall be entitled to reimbursement for sums paid for legal services in the administration of the Trust, including the preparation of this Instrument.

7. The Trustee may, but shall not be required to, pay the claim of any creditor of the Lumber Company and the Mill Company who does not desire to become or who is deemed inadvisable to have become a party to this instrument, except as modified in section 10 hereof.

8. The Trustee may institute, conduct or defend any suit or litigation which it considers advisable or necessary to the protection of the trust estate, and it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation, including attorney fees.

9. If in the conduct and management of the trust estate damage is done third parties to whom the trustee is or may be held liable therefor, the Trustee shall be reimbursed and indemnified against any liability of claim therefor from the trust estate, whether such damage was caused by the negligence or misconduct of its officers, agents, employees or not.

10. The Trustee shall advance such sum of money as it deem necessary to meet the present payroll of the Lumber Company and the Mill Company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000) Dollars, and the Trustee shall have a first and preference claim upon said Trust Estate for the amount of such advancement and the same shall be repaid to it out of the first proceeds of sales of the trust property or any part thereof or the first proceeds of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of six per cent per annum.

11. Payments made by the Trustee under the provisions of Sections 1 to 10 inclusive hereof, with interest from the time of payment to reimbursement, as well as the compensation of the Trustee, shall be deemed maintenance charges of the trust estate in preference to any other claims thereupon.

12. The Lumber Company and the Mill Company may execute notes or may renew existing notes

or renew renewal notes for their indebtedness and such other notes or renewals shall have the same right hereunder as have the claims of the creditors in their present form.

13. The Trustee may, but shall not be required to pay interest accruing upon the interest bearing claims of the creditors, if it has the money in the trust estate which it deems not required for other purposes; provided, however, that any such interest payment shall be pro-rated among all the creditors holding interest bearing claims.

14. The creditors agree that neither this instrument nor anything done or to be done in pursuance of its provisions shall be construed as a preference to any creditor, or any act of bankruptcy, but that it is entered into in pursuance of a plan which is considered equitable between all the creditors of the Lumber Company and the Mill Company and which will secure the most advantageous disposal of their property for the benefit of their creditors. The creditors likewise agree that while this instrument remains in effect and no provision hereof is violated, they will not sue the Lumber Company or the Mill Company in any court on their demands nor commence any bankruptcy or receivership proceedings against them. They understand and agree, also, that the Lumber Company and the Mill Company would not have executed this instrument and that the Trustee would not have consented to act as Trustee hereunder or to assume the obligations herein assumed by it, except upon the express agreement of the creditors in this section contained.

15. The Trustee may select and employ in and about the execution of the trust suitable agents and attorneys and it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent or attorney, if reasonable care has been exercised in the selection, and shall not be held liable for any loss or damage not caused by its own negligence or default. Neither shall it be held to have agreed to pay or be liable for any loss or damage occasioned by its failure to pay any tax, assessment, indebtedness or lien upon the trust estate save and except the taxes, indebtedness and charges which in the tenth section hereof it has expressly agreed to pay.

16. It is understood that the Central Warehouse Lumber Company of Minneapolis, Minnesota, has advanced to the Lumber Company a sum approximately Thirty-two Thousand ($32,000.00) Dollars under an agreement whereby the amount of such advancement shall be repaid in whole or in part in lumber, and it is agreed that said Trustee shall recognize said contract and carry out and perform the terms thereof notwithstanding any contrary provision herein contained. It is also agreed that if there should be any other outstanding contracts of similar nature entered into by the Lumber Company or the Mill Company, the Trustee may, in its discretion and according to its best judgment, carry out the terms thereof or make such adjustment thereof as to it may seem just and proper.

17. If at any time during the continuance of the trust any tax, charge or indebtedness shall ac-

crue which would be a lien or charge upon the trust estate superior to the claims of the parties hereto and which, in the opinion of the Trustee, it is to the best interest of the parties hereto be paid, then the Trustee may, but shall not be required to, pay such tax, charge or indebtedness and thereupon the amount so paid, together with interest thereon at the rate of six per cent per annum from the date of payment shall become a charge upon the trust estate and shall be paid out of the first money available therefrom.

18. The trust hereby created shall terminate (a) upon the payment of all the indebtedness owing by the Lumber Company to the parties to this agreement; (b) upon agreement of the creditors representing at least a majority in amount of the indebtedness of the Lumber Company and who shall have signed the within agreement, to the effect that the trust shall be terminated and the trust estate reconveyed to the Lumber Company and the Mill Company without liability on the part of the Trustee of (c) upon the disposition of the entire trust estate and the application of its proceeds as herein provided. The creditors signing the within instrument shall make out and file with the Trustee their claims against the Lumber Company and the Mill Company within Sixty (60) days from notice of the acceptance of the within trust by the Trustee. Copies of said claim shall be sent by the Trustee to the Lumber Company and the Mill Company and to each creditor who shall have signed the within instrument and if no objection to same be filed with

the Trustee within Thirty (30) days thereafter, then such claim shall be allowed by the Trustee as filed. The proceeds of the trust estate, after reimbursing the Trustee for advancements, expenses, compensations and other claims mentioned herein, shall be distributed pro rata among the Creditors of the Lumber Company and the Mill Company. Upon the termination of the trust and an accounting by the Trustee with the Lumber Company and the Mill Company and the creditors, and the reimbursement of the Trustee for all sums, expenses or loaned by it hereunder its trust estate shall be reconveyed to the Lumber Company and the Mill Company.

19. The compensation of the Trustee and the expenses and advancements made by its shall constitute a charge upon the trust estate superior to the indebtedness of any party secured hereby and the Trustee may not be removed nor be deprived of the Trust estate in any manner until the payment of its compensation, expenses and advancements have been fully provided for; provided, that upon the failure of the Trustee to accept the trust hereunder and upon its refusal to act after its acceptance, the creditors who have signed this instrument, holding a majority in amount of the indebtedness of the Lumber Company, may by deed appoint a new Trustee.

The Lumber Company and Mill Company agree that they will execute such further and additional conveyances, undertakings and agreements as shall be necessary to fully effectuate the intent of this instrument and vest title to all of their property

in the Trustee, in trust for the uses and purposes herein provided.

Several copies hereof may be executed and delivered and each copy which is duly executed and delivered shall be treated for all purposes as an original instrument.

20. This instrument shall not take effect until creditors representing ninety per cent in amount of the indebtedness of the Lumber Company have attached their signatures hereto and until the holder of the Trust Deed on the property of the Mill Company, which Trust Deed is due, has extended same for a period of two years from date; provided, however, that the debt represented by the Trust Deed shall pro rate with the other creditors who have signed the within instrument as to all distribution of dividends after one year from date hereof.

21. It is further agreed that this instrument shall not take effect until said stockholders shall cause a meeting of the stockholders of said Lumber Company and said Mill Company, to be held immediately at which the resignations of the present Secretaries and Treasurers of the two companies shall be obtained and also the resignation of one of the Directors of each of said companies and that Siegmund Katz, of Chicago, Illinois, shall be elected by said stockholders of said Lumber Company and said Mill Company, a director and Secretary of each of said companies, and provided further, that said Katz or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument, shall name, shall be

elected and retained as such Director and officer of such Lumber Company and such Mill Company until the Trust created by the within instrument shall be terminated.

It is specifically agreed that the claim of the Shoshone Lumber Company for the sum of Five Thousand ($5000) Dollars and interest represents the purchase price of timber on which a vendors lien is retained by the said Shoshone Lumber Company, until the payment of said purchase price and it is agreed that said claim will be paid by the Trustee within six (6) months from date hereof as a preferred claim.

23. It is further agreed that the claim of the Idaho Timber Company is secured by the ownership of the following mark placed upon certain White Pine and Spruce logs landed upon Marble Creek: (Certain marks here described.) Any such logs hereafter delivered to the Lumber Company or to the Mill Company shall be paid for by the Trustee at the rate of Sixteen Dollars per thousand feet board measure for White Pine logs and six dollars per thousand feet for Spruce logs and the amount thereof shall be deducted from the claim of the Idaho Timber Company. The balance of said claim shall pro rate with the other creditors in accordance with the terms of this instrument.

In witness whereof the parties hereunto have set their hands and affixed their corporation seals the day and year herein first written.

This was first signed by the bankrupt, Dryad Lumber Company, and Mechanics Loan & Trust

Company, and under separate endorsement was signed as follows:

The undersigned creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company to the amount set opposite their names, hereby become parties to and agree to all the terms and conditions of the foregoing deed of trust.

Dated February 1st, 1916.

Creditors.	*Amount of Claim.*
Merrill Cox & Co.	$221,250.00
Fort Dearborn National Bank	107,000.00
I. F. Searle	55,000.00
First National Bank, Lincoln	12,500.00
Exchange National Bank, Spokane	6,000.00
Shoshone Lumber Company	5,000.00
Idaho Timber Company	60,000.00
S. H. Hess	30,000.00
J. K. Stack	110,000.00
Genevieve Hess Tolerton	20,465.56
Mamie A. Gibbs	12,725.00

In said amended proof of claim the said claimant ant alleged that pursuant to said plan and agreement as outlined in said Trust Agreement between the dates of February 9th, 1916, and May 11th, 1916, the said Mechanics Loan & Trust Company advanced to the Bankrupt the sum of $100,000.00, which said amount was evidenced by notes payable to the said claimant.

The claimant then alleged that but for the agreement that has heretofore been set out and the signing of the same by the persons and corporations mentioned therein, it would not have advanced $100,-

000.00 but that said sum was advanced only upon the faith and credit of said Trust Agreement and the signatures thereto.

(b) That thereafter and on the 6th day of January, 1917, your petitioners and other creditors of this estate, filed with the Referee in Bankruptcy their objections to said claim and in said objections urged and pointed out among other things that said court had no jurisdiction to determine the rights of the said claimant to any dividends thereafter to be declared upon the claims of the objecting creditors or any other creditors of the bankrupt. They further objected on the grounds that the claimant was not the owner of the notes upon which said claim was based, as set out in said amended proof of claim; nor had the Mechanics Loan & Trust Company loaned, advanced or furnished to the bankrupt said sum or sums. They further alleged that said trust agreement was never consummated nor executed nor was the same ever signed by ninety per cent of the amount of the indebtedness of said bankrupt as was contemplated in said trust agreement nor did the Mechanics Loan & Trust Company extend its Trust Deed as in said trust agreement was contemplated. It was further alleged that said Mechanics Loan & Trust Company did not advance $100,000.00 or any part thereof to the bankrupt under the terms of said contract or at all nor did the said Mechanics Loan & Trust Company take over possession of the property mentioned in said contract or perform any other act under and by virtue thereof. It alleged that the said Mechanics Loan

& Trust Company, contrary to the provisions of said contract, participated in and caused the bankruptcy proceedings herein; negligently failed to collect the debts and obligations of said Company and has otherwise been guilty of neglect of the trust imposed. That the signers to said agreement were not bound by said agreement by reason of the false and fraudulent representations made to them and that the claimant was not authorized and had no authority under the laws of the State of Idaho to contract or act as alleged in its amended proof of claim, nor could it maintain its position for the reason that it had not complied with the requirements of the State of Idaho with reference to conducting business in said state.

(c) That thereafter and on to-wit: the 19th day of February, 1917, the Exchange National Bank of Spokane, Washington, filed its petition in said proceedings wherein it alleged that on or about the 1st day of February, 1916, the bankrupt, by its officers and agents represented that the assets of the bankrupt greatly exceeded the indebtedness of said company but that it was unable to obtain money to pay its present due indebtedness and set forth the execution of the trust agreement hereinbefore set forth in this petition. It alleged that the Mechanics Loan & Trust Company under said Trust Agreement furnished the sum of $100,000.00 which was evidenced by notes executed and made payable to said Mechanics Loan & Trust Company and to the said Exchange National Bank and claiming that all moneys furnished by the said Mechanics Loan & Trust Com-

pany was in truth and in fact furnished by the Exchange National Bank and not by the Mechanics Loan & Trust Company. It further alleged that before the filing of the amended claim herein for the sum of $101,162.91 by the Mechanics Loan & Trust Company, the said Exchange National Bank delivered to the said Mechanics Loan & Trust Company the promissory notes referred to in its claim going to make up the amount of said claim and that the said bank authorized the said Trust Company to file the claim in its own name and in said petition attempted to ratify the action taken by the said Mechanics Loan & Trust Company in filing its amended proof of claim; stating that said petition was filed for the purpose of removing any doubt as to the person who was entitled to have said claim allowed and to remove any technical objection to the claim of the said Trust Company. It prayed for no relief save and except that the claim of the Mechanics Loan & Trust Company be allowed and that it have a preference as prayed.

(d) Thereafter and on the 19th day of February, 1917, the petitioners herein moved to strike the petion of the said bank because it appeared from the petition that it did not have or claim any interest in the estate; was not seeking any relief and it did not appear from the petition that the said bank had delivered the notes referred to in its said petition to the Mechanics Loan & Trust Company, and for the further reason that under the Bankruptcy Act only persons having provable claims can appear and participate in the proceedings, and that the petition

failed to show that the petitioner had any such provable claim.

(e) Thereafter the Referee in Bankruptcy, before whom this estate was pending, denied said motion to strike.

(f) Thereafter, and on the 20th day of February, 1916, these petitioners filed their answer to the petition of the Exchange National Bank, denying that the Mechanics Loan & Trust Company advanced or caused to be furnished the said sums as set out therein; denied that the Exchange National Bank advanced any money on the request of the petitioners or either of them and denied that the Mechanics Loan & Trust Company or the said Bank is entitled to any lien of any kind or character. They denied that the Bank delivered to the Mechanics Loan & Trust Company the promissory notes referred to in the said petition and denied that the Mechanics Loan & Trust Company is entitled to the preference as prayed for or the dividends.

In said answer the petitioners herein averred that the notes set forth in the petition were simply renewal notes and given for like amounts and that the original notes were made to the Mechanics Loan & Trust Company and by it endorsed without recourse to the said Exchange National Bank and that the said bank, upon receipt of said notes advanced to the bankrupt and to no other person the amount thereof less its discount and that the Mechanics Loan & Trust Company never received any consideration of any kind or character from the said bank

nor did it ever pay any consideration of any kind or character to the said bankrupt for or on account of said original notes; that upon said original notes maturing, renewal notes, being the notes set forth in the said bank's petition, were executed, and although all of the renewal notes were made payable to the said Mechanics Loan & Trust Company and were endorsed by the said Mechanics Loan & Trust Company and delivered to the said bank, the said bank never paid any consideration of any kind or character to the said Mechanics Loan & Trust Company, nor did the said Trust Company ever pay any consideration therefor to the said bankrupt; that all of the consideration therefor passed directly from the Exchange National Bank to the bankrupt.

Accordingly the petitioners herein denied that the Trust Company was entitled to any preference or lien and prayed that the petition of said bank be dismissed.

(g) Thereafter, the amended claim of the Mechanics Loan & Trust Company, the petition of the Exchange National Bank of Spokane and the objections filed to the allowance of said claim, together with the answer to said petition, came on regularly for hearing before the Referee in Bankruptcy and the testimony of various witnesses was taken and after argument of counsel, the said Referee on, to-wit: May 28th, 1917, made an order allowing the said claim of the said Mechanics Loan & Trust Company, in practically its entirety.

(h) Thereafter, and on to-wit: the 7th day of June, 1917, these petitioners filed their petition for

review to the District Judge and in said petition it was set forth the following reasons why said order of the Referee be adjudged erroneous and void:

1. The Referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank or by either of them to the dividends due or which should be found due and declared to these petitioners and other creditors, or to determine any rights whatever to the dividends to be declared herein as between the claimants and the petitioners.

2. That the referee committed error in admitting the evidence of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, and other persons, or any of them and in admitting in evidence any conversations had between the said Coman and either of said persons or in the presence of any of said persons relative to what was said about what should constitute 90 per cent of the creditors of said bankrupt and relative to what was said about when said contract should take effect and relative to what was said as to what should be done under said contract and relative to what was said about Siegmund Katz coming to Spokane or Gibbs, Idaho, and relative to what was said about what he should do and the financial condition of the said Mechanics Loan & Trust Company, and relative to what was said about the said Exchange National Bank advancing any money or funds.

3. That the Referee based his decision upon incompetent testimony.

4. That he committed error in refusing to sustain the objections of the petitioners to the claim of Mechanics Loan & Trust Company.

5. That he committed error in not sustaining the objections of the petitioners to the filing and allowance of claim of the Exchange National Bank.

6. That he committed error in overruling the various objections to the claim of the Mechanics Loan & Trust Company.

7. That he committed error in allowing the claim of the Mechanics Loan & Trust Company for the sum of $101,162.91 or for any sum.

8. That he committed error in finding that the evidence disclosed that the sum of $639,940.56 was considered by the signers of said trust agreement to be at least 90 per cent of the indebtedness of the bankrupt when the agreement was signed and that when Genevieve H. Tolerton signed, that such signature would constitute 90 per cent.

9. That he committed error in finding that Siegmund Katz was not only to become a stockholder and an officer of the bankrupt but was also to represent the Mechanics Loan & Trust Company.

10. That he committed error in finding that the said Mechanics Loan & Trust Company ever took possession of the property of the bankrupt.

11. That he committed error in finding that Section 3170 of the Idaho Revised Codes as to change of possession was fully complied with by the said Mechanics Loan & Trust Company.

12. That he committed error in ordering and adjudging that the Mechanics Loan & Trust Company

be paid all dividends and moneys that may thereafter be determined by the court to be due and payable to Merrill Cox & Company, I. F. Searle and Minnie A. Gibbs and other creditors of the bankrupt and in ordering and adjudging that until the full sum of $101,162.91 was paid that said sum be declared a first lien upon the dividends of the respective parties.

13. That he committed error in granting the petition of the Exchange National Bank with the modifications that all sums found to be due should be paid jointly between the Mechanics Loan & Trust Company and the Exchange National Bank.

14. That he committed error in finding that the evidence discloses that it was understood by the signers of the trust agreement that the Mechanics Loan & Trust Company possessed but small capital but that the Exchange National Bank would advance whatever money was necessary to the proper execution of the trust not to exceed the sum of $100,000.00 and in finding that the bank did this to the extent of said sum.

15. That he committed error in allowing the claim of the Mechanics Loan & Trust Company in that the said Mechanics Loan & Trust Company is not the owner of the notes therein mentioned and has no claim whatsoever against the said bankrupt.

16. That he committed error in allowing said claim of the Mechanics Loan & Trust Company for the reason that they did not advance, loan or furnish the bankrupt any sum of money whatsoever.

17. That he committed error in allowing and ruling that the alleged contract attached to the claim of the Mechanics Loan & Trust Company as Exhibit "A" was signed by 90 per cent in amount of the indebtedness of the bankrupt, for the reason that the said contract never became operative by reason of the failure to secure the signatures of 90 per cent in amount of said creditors.

18. That he committed error in holding and deciding that said trust agreement was and is valid.

(i) That thereafter the said Petition for Review came on regularly for hearing before the Honorable Frank S. Dietrich, Judge of said Court and on to-wit: July 26, 1917, Judge Dietrich filed his opinion in writing, as follows:

"The most serious question is whether the trust agreement was signed by a sufficient number of creditors to give it validity. The referee did not find that as a matter of fact the signatures aggregated ninety per cent of the total indebtedness, nor do I think that if we regard the instrument alone, apart from the practical construction placed thereon by the parties in interest, it would be possible to make such a finding. While we might very reasonably exclude certain of the items embraced in the $871,-853.27, which the petitioners here contend is the correct footing, we cannot consistently exclude enough to give the required ratio between the entire remaining indebtedness and that represented by the signatory creditors. But I am satisfied that all the parties acted upon the assumption that with the signature of Mrs. Tolerton the condition was fully com-

plied with, and that the practical construction placed upon a writing at the time of and subsequently to its execution by the parties in interest may, and ordinarily should, be adopted by the court. From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets, but that its credit was exhausted, and that it was doubtful whether it could meet its next pay rolls. The parties who are now objecting to the recognition of the trustee's claim were large creditors, whose interests were likely to be prejudiced in case of a receivership or bankruptcy proceeding. They were desirous that the debtor should continue to appear to be a solvent, going concern; hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. They discussed the signatures that could probably be obtained, and made provision for taking up and satisfying intractable claims up to a certain amount. So far as appears, the trustees and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6,000.00, and was relatively unimportant. I am wholly at a loss to understand how the trustee could have had any strong motive of self-interest such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone

it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good morals. I have no doubt that he understood that the condition had been fully complied with, and assumed that the trustee would have the protection afforded by the trust agreement. Surely under the circumstances it was not contemplated that the trustee was at its peril to determine for itself whether the requisite ninety per cent had signed. For example, there appear to have been some controverted claims and other claims not disclosed by the records of the debtor. Was it to wait until the disputed claims were litigated or otherwise adjusted, or until the statute of limitations had fully run, in order that it might be sure that there was no undisclosed indebtedness, before it could safely proceed to execute the trust? When we come to examine the agreement we find that its spirit is out of accord with such a view. In paragraph nine it is expressly provided that in the conduct and management of the trust estate the trustee should be reimbursed out of the estate for any claim which might be asserted against it, for damage done to third persons, even though such damage might have been

caused by the negligence or misconduct of the trustee's officers, agents and employes. And in the fifteenth paragraph it is provided that if the trustee exercised reasonable care in the selection of its agents and employes it should not be held liable for any loss or damage from their negligence or default. Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000.00, or any considerable portion thereof, without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advantage, acted under the provisions of the agreement, be heard to say that it never went into effect.

When in the light of the surrounding circumstances and the conduct of the parties we consider the several items relied upon by the petitioners as

constituting part of the indebtedness, we find little difficulty in eliminating most of them. It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane, only $6,000.00. Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegal or immoral, it still remains true that $6,000.00 was the maximum actual indebtedness, and that is the only fact with which we are here concerned.

There was in truth no overdraft at the Exchange National Bank of Coeur d'Alene. While in a sense the floating checks upon this bank aggregating $15,431.07 represented indebtedness, they were issued in the expectation that current deposits would be sufficient to take care of them as they were presented. Such a species of indebtedness would naturally fluctuate from day to day, if not from hour to hour, and it is not to be assumed that the parties contemplated that it would be taken into account.

The debtor was under contract to deliver to divers persons lumber and logs to the aggregate value of $79,852.62. From one point of view, of course, these obligations are the equivalent of an indebtedness in the strict sense of the word, but the trust agreement itself bears strong internal evidence that such obligations were not intended to be taken into consideration as a part of the "indebtedness." Express reference is made to the largest of such contracts, one covering lumber of the value of $32,948.40, with a provision for its specific performance by the delivery of the lumber called for. So far as

appears, the debtor was having no trouble in meeting obligations of this character. It had sufficient assets, but its embarrassment was due to its inability to realize money thereon. Apparently it was able to meet its obligations under these contracts—which required no payments in money—and was ready to do so.

There is also an item of $19,500.00 of indebtedness due to one Yeomans, who held lumber as security. Apparently the parties intended to treat secured claims as being in a distinct class. For example, there were also obligations secured by a trust deed, but no one is contending that they should be considered in computing the indebtedness covered by the trust agreement; and yet in a very real sense, of course, they constitute indebtedness.

Most difficult perhaps of all are the numerous items, disputed and undisputed, amounting to approximately $40,000.00, which did not appear upon the debtor's books, but, as already suggested, it is hardly reasonable to suppose that anyone thought that the trustee must, at its peril, find out whether the debtor owed unrecorded debts. It is quite incredible that anyone could have been found willing to accept the trust upon such terms.

Thus far I have not referred to contention made by counsel "for creditors whose debts were incurred" by the trustee. So far as I have been able to discover, the record before me does not disclose the amount or nature of such debts, or the names of the claimants. The contention in brief is, that, whether or not the trust agreement be deemed to have become

binding upon the creditors who signed the same, it still remains true that it was signed by the trustee and by the debtor, and inasmuch as the latter undoubtedly knew that the trustee was proceeding upon the assumption that it was in effect, and was advancing moneys for its use and benefit upon such assumption, it is estopped from denying that the agreement became effective, and it, at least, is bound by the terms thereof. That being the case, it follows, so it is argued, that the trustee has a preferential claim against the estate for all moneys advanced, for the reason that the agreement was executed and went into effect more than four months prior to the adjudication, and being neither contrary to public policy nor violative of any law of the State of Idaho, it effectively operated to give to the trustee an equitable lien on the entire estate, and that such estate was taken over by the trustee in bankruptcy for the benefit of the general creditors, not only those who signed the agreement but all others, subject to such a lien. But as I view it, the record is not in a condition to warrant the consideration of this contention at the present juncture. Neither the creditors referred to in this brief, nor the trustee, is complaining of the order under review, by which the trustee was recognized as having a sort of equitable lien only upon the dividends to which the signatory creditors may become entitled. Besides, as I understand, the general creditors other than those who signed the trust agreement have neither been made parties nor appeared in this proceeding, and obviously a recognition of the conten-

tion that the whole estate came into the bankruptcy court charged with this lien would prejudiciously affect the claims of such other creditors.

As to the question whether or not the trustee ever took actual possession of the property as directed by the trust agreement, I find upon examination of the record that just such possession was taken as was doubtless contemplated by the parties. In one aspect it is true the possession was colorable more than real, and my first impression was that the trustee had treated its obligations in this respect flippantly, if not in bad faith, but when I come to analyze the record I find that it was clearly the intention of the parties signing the agreement that as little notoriety as possible be given to the transaction, and that therefore it was desired by all that the trust deed be withheld from the records until an emergency should arise making it necessary to record it, and that insofar as practicable the trustee should keep itself in the background. Any doubt which might otherwise exist is dispelled by the "side agreement" or direction to the trustee, dated February 1, 1916, and introduced as Exhibit 39. Section 21 of the agreement itself provides that the agreement should not become effective until one Sigmund Katz, of Chicago, should be elected secretary and treasurer and a director of the debtor. But it should not be seriously suggested that anyone ever intended that Katz was to represent the interests of the debtor. He was undoubtedly there for the purpose of representing the creditors, and especially these objecting creditors, for it is provided that "said Katz, or any

other person that the majority in amount of the creditors of the lumber company (the debtor) who shall sign the within instrument, shall name, shall be elected and retained as such director and officer of such lumber company * * until the trust created by the within instrument shall be terminated." It is very plain that the desire was that to the public at large the debtor should have the appearance of carrying on the business, and that, as stated in the "side agreement," as little publicity as possible should be given to the fact that its property had passed into the control of a trustee. Katz, being a member of the board of directors, and being the secretary and treasurer of the company, could gaurd against any precipitate action attempted by the debtor, until the trustee could be notified and could record the agreement and assert its exclusive right of control under the terms thereof. Katz was to be in the active management of the property, and while thus having his hand upon the throttle of the machinery of the debtor corporation he formally acknowledged himself to be the agent and representative of the trustee. It is futile now to say that the trustee violated its obligations to the creditors because it kept from the general public knowledge of its relations to the property, and of Katz's relation to it. It was undoubtedly doing precisely what the creditors wanted it to do in this respect.

The discussion has perhaps already exceeded reasonable bounds, and it is not necessary that it should be further prolonged. I have examined the other questions of fact and of law discussed in the oral

argument and in the exhaustive briefs which have been filed, but upon consideration they do not impress me as being of sufficient merit to warrant a reversal or modification of the referee's order. Accordingly it will be affirmed.

FRANK S. DIETRICH,
Judge."

(j) That thereafter and on to-wit: the 6th day of August, 1917, Judge Dietrich caused to be entered an order affirming the referee's order of May 28th, 1917, as follows, to-wit:

After due consideration of the arguments and briefs on the review of the order of the Referee in Bankruptcy in the above entitled Court and cause made and entered on the 28th day of May, 1917, at Coeur d'Alene, Idaho, allowing the claim of the Mechanics Loan & Trust Company, it is hereby ORDERED that the said order of the Referee be and the same is hereby affirmed.

III.

That the ruling of the said Honorable Frank S. Dietrich was erroneous in law and in fact in the following particulars:

(a) The referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company or by the Exchange National Bank or by either of them to the dividends due or which should be found to be due and declared to these petitioners or either of them or to determine any rights whatsoever to the dividends to be declared herein as between the said claimants and these petitioners.

(b) The said Referee committed error in admitting any evidence of E. T. Coman as to the conversations had between himself and John Fletcher, S. H. Hess, E. L. Carpenter, Bob Wetmore, I. F. Searle, C. D. Gibbs and H. J. Aaron, or any of them, and admitting evidence of any conversations had by and between the said E. T. Coman or either of said persons, or in the presence of any of said persons relative to what was said about what should constitute ninety per cent of the creditors of said bankrupt; relative to what was said about when said contract should take effect; relative to what was said as to what should be done under said contract; relative to what was said about Siegmund Katz coming to Spokane or Gibbs, Idaho; relative to what was said about what he should do; relative to what was said about the financial condition of the Mechanics Loan & Trust Company; and relative to what was said about the Exchange National Bank advancing any money or funds.

(c) The said Referee committed error in basing his decision upon said incompetent testimony.

(d) The said Referee committed error in refusing to sustain the objections made by your petitioners to the claim of the Mechanics Loan & Trust Company.

(e) Said Referee committed error in refusing to sustain the objections made by your petitioners to the filing and allowance of the claim of the Exchange National Bank of Spokane.

(f) Said Referee committed error in overruling

the several objections to the amended proof of claim of the Mechanics Loan & Trust Company.

(g) Said Referee committed error in allowing the claim of the Mechanics Loan & Trust Company in the sum of $101,162.91.

(h) The said Referee committed error in allowing the claim of the Mechanics Loan & Trust Company for any sum.

(i) The said Referee committed error in finding that the evidence discloses that the sum of $639,-940.56 was considered by the signers of said trust agreement to be at least 90 per cent of the indebtedness of the bankrupt at the time of signing said trust agreement and that when Genevieve H. Tolerton signed said agreement then that 90 per cent of said indebtedness of said bankrupt would have signed.

(j) Said Referee committed error in finding that Siegmund Katz was not only to become a stockholder and an officer of the Stack-Gibbs Lumber Company, but was also to represent the Mechanics Loan & Trust Company.

(k) The said Referee committed error in finding that the Mechanics Loan & Trust Company took possession of the property of the Stack-Gibbs Lumber Company by and through its representative the said Siegmund Katz.

(l) Said Referee committed error in finding that in so far as the signers of said trust agreement are concerned Section 3170 of the Idaho Revised Codes as to change of possession was fully complied with by said Mechanics Loan & Trust Company.

(m) The said Referee committed error in ordering and adjudging that the Mechanics Loan & Trust Company be paid all dividends or moneys that might thereafter be determined by the court to be due and payable to the following persons or corporations signing said trust agreement, to-wit: Merrill Cox & Company; Fort Dearborn National Bank; I. F. Searle, First National Bank of Lincoln, Nebraska, Exchange National Bank of Spokane, Washington, Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton, and Minnie A. Gibbs, until the full amount of $101,162.91 was paid, and in ordering and adjudging that said sum be declared to be a first lien upon the dividends of said respective parties.

(n) Said Referee committed error in granting the petition of the Exchange National Bank of Spokane, Washington, with the modification that all sums thereafter found to be due and payable to the Mechanics Loan & Trust Company should be paid jointly with said Exchange National Bank of Spokane, Washington.

(o) Said Referee committed error in finding that the evidence discloses that it was understood by the signers of the trust agreement under consideration that the Mechanics Loan & Trust Company possessed but small capital but that the said Exchange National Bank would advance whatever money was necessary to the proper execution of the trust not to exceed the sum of $100,000.00, and in finding that said bank did this to the extent of said sum.

(p) Said Referee committed error in allowing said claim of the Mechanics Loan & Trust Company in that the claimant, Mechanics Loan & Trust Company, is not now and never was the owner of the notes therein mentioned and the evidence shows that it has no claim whatsoever against the said bankrupt.

(q) Said Referee committed error in allowing the claim of the said Mechanics Loan & Trust Company in that the said claimant, Mechanics Loan & Trust Company, did not advance or furnish to the above named bankrupt any sum of money whatsoever.

(r) Said Referee committed error in allowing and ruling that the alleged contract attached to the claim of said Mechanics Loan & Trust Company was signed by 90 per cent in amount of the indebtedness of said bankrupt, in that the said alleged contract never became operative by reason of the failure to secure the signatures of 90 per cent in amount of said creditors.

(s) Said Referee committed error in holding and deciding that said trust agreement was and is valid.

(t) The Judge of the above entitled Court committed error in not adjudging the order of the Referee to be erroneous and void.

(u) The Judge of this Court committed error in refusing to adjudge that the said Referee in Bankruptcy was without jurisdiction to pass upon the claim of a preference or lien by the said the Mechanics Loan & Trust Company or the Exchange

National Bank or either of them to the dividends due or which should thereafter be found to be due and declared to these petitioners or either of them or to determine any rights whatsoever to the dividends to be declared herein as between the said claimants and these petitioners and other creditors.

(v) The Judge of this Court committed error in refusing to sustain each and all of the various objections and exceptions to the rulings and orders of the said Referee in Bankruptcy made by these petitioners and other creditors in the premises.

(w) The Judge of this Court committed error in affirming the order of the Referee.

IV.

That the amount involved in the above controversy exceeds the sum of $2,000.00, but that said amount exclusive of interests amounts to approximately $100,000.00.

WHEREFORE, your petitioners, feeling aggrieved because of such orders and each of them, ask that the same may be reviewed in matters of law by your Honorable Court, as provided in Section 24-B of the Bankruptcy law of 1898 and the rules and practice in such cases provided.

W. A. ARMSTRONG,
Trustee in Bankruptcy.
By Robert Weinstein, His Attorney.
MERRILL COX & COMPANY,
By Elmer H. Adams, Harry L. Cohn,
Adams, Crews, Bobb & Westcott, Its
Attorneys.

I. F. SEARLE,
By Reese H. Voorhees & H. W. Canfield,
His Attorneys.
MINNIE A. GIBBS,
By Reese H. Voorhees & H. W. Canfield,
Her Attorneys.
Harry L. Cohn,
Robert Weinstein,
Voorhees & Canfield,
Adams, Crews, Bobb & Wescott,
Attorneys for Petitioners.

United States of America,
State of Washington,
Spokane County,—ss.

I, Harry L. Cohn, being first duly sworn, upon oath depose and say: That I am the attorney for the Petitioner, Merrill Cox & Company; that Merrill Cox & Company has no officer or agent within the County of Spokane, State of Washington, or nearer to Boise, Idaho, or Coeur d'Alene, Idaho, than Chicago, Illinois; that affiant is the agent and attorney of the said Merrill Cox & Company for the purpose of all litigation in the above entitled matter and the prosecution of this Petition for Review and that the Statement of Facts contained in the foregoing Petition for Review are true according to the best of my knowledge, information and belief.

HARRY L. COHN.

Subscribed and sworn to before me this 7th day of August, 1917.

(N. P. Seal) MAURICE OPPENHEIMER,
Notary Public, in and for the State of Washington, residing at Spokane.

Service of petition acknowledged by attorneys for Exchange Nat. Bank and Mechanics Loan & Trust Company.

Endorsed: Filed Aug. 9, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 905

EXCEPTIONS.

Come now the Petitioners, W. A. Armstrong, the Trustee in Bankruptcy herein, and Merrill Cox & Company, I. F. Searle and Minnie A. Gibbs, and, at the time of the signing of the order by the above entitled Court passing upon the petition of these, the Trustee, and these and various other creditors, reviewing the Findings and Report of the Referee, which were made on the 28th day of May, 1917, and excepts to the Court's ruling as follows:

1. The petitioners except to the refusal of the court to sustain its exceptions and objections that the Referee has had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank of Spokane, Washington, or either of them, to the dividends due or which should be found to be due and declared to petitioning creditors, and other creditors of said estate, or to determine any rights whatsoever to the dividends to be declared herein as between the said claimants and these said petitioners.

2. The petitioners except to the refusal of the Court to sustain its exceptions and objections that

the Referee committed error in admitting any evidence of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, E. D. Carpenter, Bob Wetmore, I. F. Searle, C. D. Gibbs and H. J. Aaron, or any of them, and of admitting evidence of any conversations had by and between the said E. T. Coman and or either of said persons, or in the presence of said persons to what was said about what should constitute 90 per cent of the creditors of said bankrupt; relative to what was said about when said contract should take effect; relative to what was said about what should be done under said contract; relative to what was said about Siegmund Katz coming to Spokane or Gibbs, Idaho; relative to what was said about what he should do; relative to what was said about the financial condition of the Mechanics Loan & Trust Company and relative to what was said about the Exchange National Bank advancing any money or funds.

3. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in basing his decision upon incompetent testimony.

4. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in refusing to sustain the objections made by these petitioners to the claim of the Mechanics Loan & Trust Company.

5. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in refusing to sustain the objections of your petitioners to the filing and

allowance of the claim and petition of the Exchange National Bank.

6. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in overruling the several objections to the amended proof of claim of the Mechanics Loan & Trust Company.

7. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in allowing the claim of the Mechanics Loan & Trust Company in the sum of $101,162.91.

8. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in allowing the claim of the Mechanics Loan & Trust Company for any sum.

9. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding that the evidence discloses that the sum of $639,940.56 was considered by the signers of said trust agreement to be at least 90 per cent of the indebtedness of said bankrupt at the time of signing said trust agreement and that when Genevieve H. Tolerton signed, then 90 per cent of said indebtedness of said bankrupt would have signed.

10. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding that Siegmund Katz was not only to become a stockholder and an officer of the Stack-Gibbs Lumber Company, but

was also to represent the Mechanics Loan & Trust Company.

11. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding that the said Mechanics Loan & Trust Company took possession of the property of the Stack-Gibbs Lumber Company by and through its representative, the said Siegmund Katz.

12. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding that in so far as the signers of the Trust agreement are concerned, Section 3170 of the Idaho Revised Codes as to change of possession was fully complied with by said Mechanics Loan & Trust Company.

13. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding, ordering and adjudging that the said Mechanics Loan & Trust Company be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons or corporations signing said trust agreement, to-wit: Merrill Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Lincoln, Nebraska, Exchange National Bank of Spokane, Washington, Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs until the full amount of $101,162.91 was paid and in ordering and adjudg-

ing that said sum be declared to be a first lien upon the dividends of the respective parties.

14. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in granting the petition of the Exchange National Bank of Spokane, Washington, with the modification that all sums thereafter found to be due and payable to Mechanics Loan & Trust Company should be paid jointly with the said Exchange National Bank of Spokane, Washington.

15. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in finding that the evidence discloses that it was understood by the signers of the trust agreement that the Mechanics Loan & Trust Company possessed but small capital but that the Exchange National Bank of Spokane would advance whatever money was necessary to the proper execution of the trust, not to exceed the sum of $100,000.00, and in finding that the said bank did this to the extent of said sum.

16. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in allowing the said claim of the Mechanics Loan & Trust Company in that the said Mechanics Loan & Trust Company is and was not the owner of the notes mentioned in its said claims, and the evidence shows that it has and had no claim whatsoever against the bankrupt.

17. The petitioners except to the refusal of the Court to sustain its exceptions and objections that

the Referee committed error in allowing the claim of the said Mechanics Loan & Trust Company for the reason that the said Mechanics Loan & Trust Company did not loan, advance or furnish to the above named bankrupt any sum of money whatsoever.

18. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in allowing and ruling that the alleged contract attached to the claims of the Mechanics Loan & Trust Company was signed by 90 per cent in amount of the indebtedness of the said bankrupt, in that the said alleged contract never became operative by reason of the failure to secure the signatures of 90 per cent in amount of said creditors.

19. The petitioners except to the refusal of the Court to sustain its exceptions and objections that the Referee committed error in holding and deciding that said trust agreement was and is valid.

20. The petitioners except to the refusal of the Court to sustain each and every exception and objection made and contained in the petition of these petitioners and other creditors, for the Review of the Report of the Referee, made on the 28th day of May, 1917, which said petition was filed June 7th, 1917.

21. The petitioners except to the whole and every part of the order of the Court entered herein, and particularly to that part of said order wherein and whereby the said Court confirms the report and order of the said Referee which it reviewed.

22. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed Findings of Fact herein, and particularly, the first paragraph thereof.

23. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact herein, and particularly, the second paragraph thereof.

24. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the third paragraph thereof.

25. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the fourth paragraph thereof.

26. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the fifth paragraph thereof.

27. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the sixth paragraph thereof.

28. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the seventh paragraph thereof.

29. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the eighth paragraph thereof.

30. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the ninth paragraph thereof.

31. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly the tenth paragraph thereof.

32. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and particularly, the eleventh paragraph thereof.

33. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed conclusions of law and particularly, the first paragraph thereof.

34 The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed conclusions of law and particularly, the second paragraph thereof.

35. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed conclusions of law and particularly, the third paragraph thereof.

36. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed findings of fact and each and every part thereof.

37. The petitioners except to the refusal of the Court to make and cause to have entered herein its proposed conclusions of law and each and every part thereof.

38. The petitioners except to the refusal of the Court to sign its proposed order or decree, which together with said proposed findings of fact and conclusions of law, was duly presented to the Court for signature at the time the order confirming the report of the referee herein was signed, and both said decree, and proposed findings of fact and conclusions of law were refused by the Judge of said Court.

39. The petitioners except to that part of the order of the Court wherein the dividends or moneys payable unto these petitioners, save and except the Trustee in bankruptcy, as well as other creditors, is ordered paid unto the Mechanics Loan & Trust Company until the sum of $101,162.91 is paid.

ROBERT WEINSTEIN,
Attorney for W. A. Armstrong, Trustee in Bankruptcy.

ELMER H. ADAMS,
HARRY L. COHN,
ADAMS, CREWS, BOBB & WESTCOTT,
Attorneys for Merrill Cox & Company.

REESE H. VOORHEES and
H. W. CANFIELD,
Attorneys for I. F. Searle and Minnie A. Gibbs.

The foregoing exceptions were, at the time of the signing of the order herein, considered by the Court, and said exceptions were allowed.

August 9th, 1917.

FRANK S. DIETRICH, Judge.

Filed August 9, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

(Refused by the Court.)

The above entitled cause came on to be heard before the above entitled Court upon a review of an order made by the Referee in Bankruptcy herein allowing the claim of the Mechanics Loan & Trust Company, which said order was entered by the Referee upon the 28th day of May, 1917, and the Court having heretofore heard the arguments of counsel for the respective parties hereto, the above named claimant, the Mechanics Loan & Trust Company and the above named petitioner, Exchange National Bank of Spokane, Washington, appearing by Post, Russell, Carey & Higgins, Esqs., its attorneys, and the Trustee in Bankruptcy herein appearing by Robert Weinstein, Esq., his attorney, and various creditors herein appearing by Danson, Williams & Danson, Harry L. Cohn, Voorhees & Canfield, Adams, Crews, Bobb & Westcott, Esqs., attorneys for said several creditors, and the Court having heard the arguments of counsel and having considered the testimony heretofore taken herein before the Referee upon the hearing of said claim and petition and having duly considered the same and being fully advised in the premises makes and finds the following

FINDINGS OF FACT.

I.

That heretofore a petition in involuntary bankruptcy was filed and after proceedings had thereon

in the manner provided by law, the Stack-Gibbs Lumber Company, a corporation, was duly adjudged a bankrupt and an order of adjudication in bankruptcy was entered against the said corporation.

II.

That thereafter one W. A. Armstrong was duly appointed, the Trustee of said bankrupt and at all of the times herein mentioned has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

III.

That heretofore the Mechanics Loan & Trust Company filed its claim against the above named bankrupt and thereafter and on the sixth day of January, 1917, the said Mechanics Loan & Trust Company filed an amended claim against the bankrupt and prayed that the amount of said claim become a preference in that all dividends paid or ordered to be paid to certain creditors should be first applied upon said preference claims until the said Mechanics Loan & Trust Company should have received the full sum of $101,162.91.

IV.

That thereafter Merrill Cox & Company, S. H. Hess, I. F. Searle, Minnie A. Gibbs, The Idaho Timber Company, The Shoshone Lumber Company, all creditors of said bankrupt, whose claims had been approved and allowed as well as the Trustee in Bankruptcy filed objections to the allowance of said claim of the said Mechanics Loan & Trust Company.

V.

That the matter of the allowance of said claim of Mechanics Loan & Trust Company came on for hearing before the Referee in Bankruptcy herein and proceedings were had by the taking of testimony therein. That during the hearing thereof and on, to-wit, the nineteenth day of February, 1917, the Exchange National Bank of Spokane, Washington, filed its petition in said matter praying that the claim of the Mechanics Loan & Trust Company be allowed in its entirety and stating therein that notwithstanding that it the said Exchange National Bank was the owner of the notes upon which the said claim was based that it the said bank had sanctioned and approved the said trust company filing its claim herein.

VI.

That after said petition had been filed the creditors hereinbefore named moved to strike the said petition which said motion was overruled and thereafter the said creditors filed an answer to said petition and the hearing of the claim of the Mechanics Loan & Trust Company and the petition of the said Exchange National Bank were consolidated by an order of the said Referee and the said cause proceeded by the taking of testimony therein.

VII.

The Court finds that the said Mechanics Loan & Trust Company did not at any time advance any money whatsoever to the said bankrupt herein and has no claim against said bankrupt which is prov-

able in bankruptcy or otherwise. And in this connection the court finds that the contract set out and attached to the said amended proof of claims of the said Mechanics Loan & Trust Company and which is referred to in the petition of the Exchange National Bank was not signed by 90 per cent of the creditors of the bankrupt as contemplated therein and the said trust agreement never took effect and is of no force or validity and that the said Mechanics Loan & Trust Company never in any manner or at any time took possession of the assets of the bankrupt as in said trust agreement contemplated.

VIII.

The Court finds that while moneys were advanced to the bankrupt, they were in truth and in fact loaned to the said bankrupt by the Exchange National Bank of Spokane, but that the said Exchange National Bank of Spokane was not a party to said trust agreement, had no right thereunder, and that the said bank has filed no claim herein.

IX.

That the said Mechanics Loan & Trust Company and the said Exchange National Bank of Spokane concealed from the other creditors of said bankrupt the fact that the said bankrupt was insolvent and in a desperate financial condition and in failing circumstances and therein acted in bad faith toward the other creditors of the said bankrupt.

X.

That the said Mechanics Loan & Trust Company is not the owner of the notes set out in claim filed herein.

XI.

That said Referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank or by either of them to the dividends due or which should be found to be due and declared to these petitioners or either of them or to determine any rights whatsoever to the dividends to be declared herein as between the claimants and the objecting creditors.

And from the foregoing Findings of Fact the Court makes its Conclusions of Law as follows, to-wit:

I.

That the claim of the Mechanics Loan & Trust Company against the bankrupt herein should be disallowed and rejected.

II.

That the petition of the Exchange National Bank herein should be dismissed.

III.

That the Referee as well as this Court was and is without jurisdiction to hear and determine any contention herein relative to the rights of the claimant and the petitioner or either of them to have the dividend due to the objecting creditors paid to them or either of them.

Done in open court the .... day of August, 1917.

....

Judge.

PROPOSED ORDER.

The above entitled cause came on to be heard before the above entitled Court upon a review of an order made by the Referee in Bankruptcy herein allowing the claim of the Mechanics Loan & Trust Company, which said order was entered by the Referee upon the 28th day of May, 1917, and the Court having heretofore heard the arguments of counsel for the respective parties hereto, the above named claimant, the Mechanics Loan & Trust Company and the above named petitioner, Exchange National Bank, of Spokane, Washington, appearing by Post, Russell, Carey & Higgins, Esqs., its attorneys, and the Trustee in Bankruptcy herein appearing by Robert Weinstein, Esq., his attorney, and various creditors herein appearing by Danson, Williams & Danson, Harry L. Cohn, Voorhees & Canfield, Adams, Crews, Bobb & Westcott, Esqs., attorneys for said several creditors, and the Court having heard the arguments of counsel and having considered the testimony heretofore taken herein before the Referee upon the hearing of said claim and petition and having duly considered the same and being fully advised in the premises and having made and entered herein its Findings of Fact and Conclusions of Law.

Now therefore, it is ordered, adjudged and decreed that the claim of the Mechanics Loan & Trust Company and the amended claim of the Mechanics Loan & Trust Company against the bankrupt and as against the objecting creditors be in its entirety and the same is hereby disallowed and rejected in each and every particular.

It is further ordered, adjudged and decreed that the petition of the Exchange National Bank of Spokane, Washington, herein be and the same is hereby dismissed.

Done in open court this .... day of August, 1917.

BY THE COURT.

....

Judge.

Refused for the reason that no findings were requested or suggested until after the order complained of was entered.

August 9th, 1917.

DIETRICH, Judge.

(Endorsed): Filed Aug. 9, 1917. W. D. Reynolds, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY (a corporation)

Bankrupt.

IN THE CONSOLIDATED MATTER OF THE CLAIM OF MECHANICS LOAN & TRUST COMPANY, AND THE PETITION OF EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON.

United States of America,—ss.

To Mechanics Loan & Trust Company and the Exchange National Bank of Spokane and to Frank T. Post and Post, Russell, Carey & Higgins, your attorneys.

You are notified that I. F. Searle, Minnie A. Gibbs and Merrill Cox & Company, the Appellants, herewith presents and serves upon you their Bill of Exceptions as follows, to-wit:

H. W. CANFIELD,
REESE H. VOORHEES,
ELMER H. ADAMS,
HARRY L. COHN,
Attorneys for Appellants.

(Title of Court and Cause.)

APPEARANCES.

H. W. Canfield and Rees H. Voorhees, Spokane & Eastern Trust Building, Spokane, attorneys for I. F. Searle and Minnie A. Gibbs.

Danson, Williams & Danson, Paulson Building, Spokane, Washington, attorneys for S. H. Hess, Idaho Timber Co. and Shoshone Lumber Co.

Elmer H. Adams, 76 West Monroe street, Chicago, and Harry L. Cohn, 501 Mohawk Building, Spokane, Washington, attorneys for Fort Dearborn National Bank and Merrill Cox & Company.

Frank T. Post, Exchange National Bank Building, Spokane, Washington, attorney for Mechanics Loan & Trust Company, and Exchange National Bank of Spokane.

BILL OF EXCEPTIONS.

Be it remembered that this cause came on regularly for hearing before L. L. Lewis, Esquire, Referee in Bankruptcy, on the third day of January, A. D. 1917, at the hour of ten o'clock in the forenoon of said day, pursuant to the order theretofore made

and entered herein, the Mechanics Loan & Trust Company appearing by its officers and by Frank T. Post and Post, Russell, Carey & Higgins, its attorneys, and the appellants, I. F. Searle and Minnie A. Gibbs appearing by their attorneys, H. W. Canfield and Reese H. Voorhees; and Fort Dearborn National Bank and Merrill Cox & Company appearing by Elmer H. Adams, Esquire, and S. H. Hess, Idaho Timber Co. and Shoshone Lumber Co. appearing by R. F. Danson, their attorney. And thereafter the following proceedings were had:

Thereupon Siegmund Katz being called as a witness on behalf of the Mechanics Loan & Trust Company, and being first duly sworn, testified as follows:

TESTIMONY OF SIEGMUND KATZ.

Direct Examination.

Examined by Mr. Post:

My name is Siegmund Katz. I came to Spokane on February 16, 1916, from Chicago, having previously been in the lumber business for about six years, manufacturing and selling lumber. I was introduced to Mr. Gibbs in Chicago and talked over with him the terms under which I was supposed to come here. I was introduced to Mr. Gibbs by Mr. Tilden of Merrill, Cox & Company, he being one of its officers. I had known Mr. H. J. Aaron for a few months prior to that, who introduced me to Mr. Tilden. I do not know who Mr. Aaron represents. Mr. Aaron was the first one who suggested that I come to Gibbs, Idaho. At that time I do not think he told me the purpose for which he desired me to come, or

whom he represented. On my arrival in Spokane I went to the Exchange National Bank and if I remember right I was there in the morning and was told that Mr. Coman was out. I brought a letter of introduction along but I do not know who wrote it. It was to Mr. Coman. The letter was given to me, however, by Mr. Aaron. I am the secretary of the Stack-Gibbs Lumber Company.

Mr. Post: Find the minutes of the meeting of the Board of Directors, February 15, 1916.

The Witness: Yes, sir.

Mr. Post: I offer in evidence these minutes of February 15, 1916.

The minutes were admitted without objection, and marked Petitioners' Exhibits 1 and 2. Exhibit 1 is a minute of a stockholders' meeting of the bankrupt held on February 15, 1916, showing an election of a board of directors for the corporation, and that the members elected are C. D. Gibbs, S. Katz and H. F. Cleland. Exhibit 2 is a minute of the regular meeting of the board of directors held on February 15, 1916, showing the election of C. D. Gibbs as president, H. F. Cleland as vice president, and S. Katz as secretary and treasurer of the bankrupt corporation.

The Witness: I do not know whether I signed an affidavit qualifying as a director of the Stack-Gibbs Lumber Company as I signed so many things I do know. The record that I have now before me shows that a stockholders' meeting of said corporation was held on February 18. (60).

Mr. Post: Offering in evidence the minutes of the stockholders' meeting of February 18th, 1916, which

were admitted and marked Petitioner's Exhibit No. 3. This exhibit is the minutes of a stockholders' meeting of February 18, 1916, and shows that 7000 shares out of a total stock of 8000 shares were represented, and that the trust deed which is attached to and made a part of the amended petition of the Mechanics Loan & Trust Company herein was presented at the meeting and a resolution was unanimously adopted authorizing and instructing the board of directors of the company to execute or cause to be executed said trust deed. A copy of said trust deed is set out in said minutes, and said copy has as a part thereof the following: "The undersigned creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company, to the amounts set opposite their names, hereby become parties to and agree to all the terms and conditions of the foregoing deed of trust dated February 1, 1916.

Creditors.	*Amount of Claim.*
Merrill, Cox & Company	$221,250.00
By H. J. Aaron, its attorney.	
Fort Dearborn National Bank	107,000.00
By H. J. Aaron, its attorney.	
I. F. Searle	55,000.00
First National Bank of Lincoln, Nebraska, by I. F. Searle	12,500.00
The Exchange National Bank of Spokane	6,000.00
By Edwin T. Coman, President.	
Shoshone Lumber Company	5,000.00
By E. L. Carpenter, President.	
Idaho Timber Company	60,000.00
By E. L. Carpenter, Treasurer.	

S. H. Hess 30,000.00
J. K. Stack.. 110,000.00
Genevieve Hess Tolerton.......................... 20,465.56

Mr. Post: I offer the minutes of the meeting on pages 202 and 203 of the Minute Book, marked Petitioner's Exhibit No. 4. Said exhibit is a minute of the meeting of the board of directors of the bankrupt corporation held on February 18, 1916, showing the directors present as C. D. Gibbs, H. F. Cleland and S. Katz. Said trust deed was presented and considered and a resolution unanimously adopted authorizing and instructing the president and secretary of the corporation to execute the same.

The Referee: No objection being made, they will be admitted.

The Witness: At these meetings you were present in Gibbs, Idaho. Subsequently, the next meeting that appears in the book is August 1st, 1916, a meeting of the Board of Directors of the Stack-Gibbs Lumber Company. (62.)

These minutes were offered in evidence, marked as Petitioner's Exhibit No. 5 and were admitted and read to the court by Mr. Post. This minute of the meeting of the board of directors of August 1, 1916, is to the effect that all of the directors were present and that S. Katz acted as secretary, and that Mr. Gibbs reported that a petition in bankruptcy had been filed against the corporation alleging that the corporation was insolvent and had committed acts of insolvency, and that there had also been filed a petition for the appointment of a receiver of the corporation until a trustee in bankruptcy could be

elected, and that on motion of Mr. Katz, seconded by Mr. Cleland, a resolution was adopted directing Mr. Gibbs, as president, to file an answer in the bankruptcy proceedings in the United States District Court admitting the insolvency of the corporation and consenting to the appointment of such receiver.

Mr. Post: I offer in evidence what appears on page 59 of the Secretary's book of the Dryad Lumber Company, a meeting of the Board of Trustees of that company at which, according to the minutes, Mr. Cleland resigned as Secretary-Treasurer and Mr. Canfield resigned as Trustee and Vice-President and Mr. Katz was elected Treasurer and also trustee.

Mr. Adams: What is the date?

Mr. Post: February 16, 1916. Said minutes were admitted in evidence and marked Petitioner's Exhibit No. 6. Said minutes show that the meeting of the board of trustees of the Dryad Lumber Company was held on February 15, 1916; that Mr. Canfield resigned as trustee and vice-president, and that Mr. Cleland resigned as secretary and treasurer, and that S. Katz was elected a member of the board of trustees and also as secretary and treasurer and that Mr. Cleland was elected as vice-president.

Q. The stockholders' meeting of the Dryad Lumber Company held on the 18th day of February, 1916, at which you were present and there is a minute here, commencing with page 60?

A. Correct.

Mr. Post: I offer the minutes of this meeting in evidence, a similar resolution was passed there as at the Stack-Gibbs Lumber Company, February 18th, authorizing this trust deed.

Whereupon the minutes referred to were admitted in evidence and marked Petitioner's Exhibit No. 7 admitted. (63.) Said minutes show that the stockholders' meeting of Dryad Lumber Company was held on February 18, 1916, at which 2187⅞ shares were represented, being all the stock except 312⅛ shares, and that the trust deed attached to the amended petition of Mechanics Loan & Trust Company was considered, and that a resolution was unanimously adopted authorizing and instructing the board of directors to execute or cause to be executed said trust deed.

On the same date the board of trustees of the Dryad Lumber Company held a meeting, at which I was present, and the minutes are at pages 75 and 76. Mr. Post offered the minutes in evidence and the same were received and marked Exhibit 8. Said minutes show a meeting of the board of trustees on the day named, at which all the trustees were present, and that a motion was made by Mr. Cleland and seconded by Mr. Katz that the president and secretary of the corporation be authorized and instructed to execute the trust deed in question, and that the same was unanimously adopted.

On August 1, 1916, the board of directors of the Dryad Lumber Company held a meeting, and said minutes are on pages 77 and 78. Said minutes were offered and received in evidence and marked Exhibit

9. Said minutes show a meeting of the board of directors of said company; that Mr. Katz acted also as secretary, and that Mr. Nelson reported to the meeting that a petition in bankruptcy had been filed against the Dryad Lumber Company, and also a petition for the appointment of a receiver until a trustee in bankruptcy could be elected. Mr. Katz introduced a resolution that the president of the company be authorized to file an answer in the bankruptcy proceedings admitting the insolvency of the company and consenting to the appointment of a receiver, and that said motion was adopted.

Q. Please look at that (referring to Exhibit No. 10) and tell us whether February 22, 1916, you sent a letter to each of the creditors named in the trust deed set forth in the minutes now in evidence and whether that is one of such letters?

Mr. Adams: I object, as the notice is the best evidence.

Mr. Post: Did you bring here your correspondence, Mr. Adams?

Mr. Adams: No, I didn't have any notice to bring it.

Mr. Post: You didn't bring anything then?

Mr. Adams: Only my office files.

Mr. Post: You have here a letter of February 22, 1916?

Mr. Adams: No, sir; never knew of any such letter.

Mr. Post: Got any letters written by Mr. Katz?

Mr. Adams: No, sir.

Mr. Canfield: May it be understood that any ob-

jection made by Mr. Adams applies to each of the objecting creditors.

Mr. Post: That is all right.

The Referee: The objection overruled.

Mr. Adams: Exception.

The Witness: I asked all the creditors who signed the trustee's agreement.

Mr. Post: To whom did you send this letter?

A. I believe it is mentioned in the letter. I sent a duplicate of this letter to the Mechanics Loan & Trust Company, the Fort Dearborn National Bank, Merrill, Cox and the Exchange National Bank.

Mr. Post: I offer this letter in evidence.

Mr. Adams: I object, as no sufficient foundation is laid and that it is incompetent, irrelevant and immaterial and inadmissible as to any creditor.

The Referee: The objection is overruled.

Mr. Adams: Save an exception.

Said letter dated February 22, 1916, addressed to The Exchange National Bank of Spokane, states: "I hereby hand you our daily bank statement for January 21st. It is our intention to send you a daily statement like this one every day. Before getting the form printed, we would appreciate your suggestions, or if you want any additional information on this statement, kindly let us know in time. Aside from this daily bank statement we will send a trial balance every month, which we will send about the 15th of the following month."

This letter also states: "Of the $100,000 additional credit which we are to receive from the Mechanics Loan & Trust Company in accordance with

the new trust agreement, we have so far received $60,000. We received the first loan on February 10th. Since that time we have had receipts of shipments amounting to $8500, making a total of $68,-500 at our disposal for disbursements. We have disbursed this amount as follows:

Refund advanced Bardwell-Robinson	$ 3,700
Refund advanced Lampert Lumber Company	9,500
Log contracts	15,500
Payroll	18,200
Bank overdrafts	12,000
Freight on logs	7,600
Accounts payable	1,000
Interest	1,000
	$68,500

About our future requirements against the remaining $40,000 credit, we will report as we need it. Copies of this letter, as well as daily bank statements, have gone to Mechanics Loan & Trust Company, Fort Dearborn National Bank, Merrill, Cox & Company and Exchange National Bank of Spokane."

The Witness: I signed this letter. I have a book here showing how that $68,500.00 was paid out and given to me by Mr. Cleland as follows:

Starting with the first item, Bardwell-Robinson of date February 22, 1916, I have not that account here, that's in a different ledger. Yes—yes—$3681.40, check No. 2777, February 12, check drawn on the Exchange National Bank of Spokane. Of course it happened before I came here, but I know it anyhow; Bardwell-Robinson was a customer of ours and Mr.

Gibbs got an advance from him in actual cash, there was supposed to be lumber shipped against it, but Mr. Gibbs afterward preferred to pay the money back because the prices under the contract were so low that he didn't care to ship the goods. Lambert Lumber Company, February 12, $9559.68 for the same reason.

Q. Now, the next item you have in your letter is logging contracts, $15,500.00.

A. There may be several items, but I see one of them right here, $640 from the American Trust Company in favor of J. A. Thornton, a logging contractor. (Here the witness detailed various amounts that were paid out) (page 68) and stated that these were contractors working for the bankrupt getting out logs, and this was money owing them on account of logging contracts.

Q. The next item is payroll, $18,200.00 (69).

A. This is mentioned here under the name of the Dryad Lumber Company; the Stack-Gibbs Lumber Company didn't have any payroll but the Dryad Lumber Company did and when payday came around the Stack-Gibbs Lumber Company put sufficient money over into the Dryad Lumber Company to take care of it, that is why you will find in here mentioned simply under the Dryad Lumber Company. I believe that the sum of $18,200.00 is correct, but these are Mr. Cleland's figures. We kept different books and there was a different President and everything, but the officers were the same and they attended to the affairs of both companies. The Dryad Lumber Company had the payroll entirely and the Stack-

Gibbs Lumber Company had no payroll except the office force. The payroll was kept for the purpose of paying off the men of the Dryad who ran the mill and the planing mill. (70.)

The lumber that was manufactured by the Dryad Lumber Company was turned over then to the Stack-Gibbs Lumber Company, that is they sawed it for the Stack-Gibbs Lumber Company. The Stack-Gibbs Lumber Company paid the Dryad for doing this work; there was a contract between the two to pay them so much per thousand for whatever work was to be done.

Q. And they did it in part by paying the payroll for the men?

A. No, they never paid the payroll for the men. They put sufficient money into the Dryad so the Dryad could pay the men. (71.) The Dryad was an employe of the Stack-Gibbs.

An adjournment was taken until January 6th at 1:30 P. M. (73.)

The Witness: I have not the book here to figure out the overdraft and what figures I do know were given to me at the time. I see all kinds of overdraft but it does not always show the date, for instance, on the 10th—

Q. The letter is dated February 22nd?

A. Since the $40,000.00 was received, all right.

A. I am going to start with the 11th because it says—

then the $40,000.00 was received. We received the $40,000.00 on the 10th and then we started to dis-

tribute that money, February 10th, 1916. We started with the receipt of $40,000.00. (73)

Mr. Canfield: The letter states that between the 10th and 22nd of February you reduced the bank overdraft by the amount of $12,000.00, is that the fact?

A. All I can really tell you is to give you the data, the overdrafts in the different banks as we made them up, starting in there are the amounts of the Fort Dearborn National Bank, on the 11th it was not overdrawn; Coeur d'Alene, Exchange National Bank, on the 11th, overdrawn about $6,000.00 in round sums; remained so on the 11th the same thing; the Fort Dearborn National Bank was overdrawn on the 14th about $22,000.00. I will explain those are not really overdrafts because Merrill Cox & Company discounted our notes at the Fort Dearborn National Bank and renewals done through the Fort Dearborn; in other words on account of the money going back and forth until we got credit for the renewal notes, the account was overdrawn; Coeur d'Alene Exchange National Bank was still overdrawn in the same way; on the 15th the Fort Dearborn was the same but the Exchange National Bank was overdrawn $8,000.00. I mean the Exchange National Bank of Spokane. (74) On the 16th, the Fort Dearborn showed the same, the Exchange of Spokane, $10,000.00 overdrawn and the Coeur d'Alene had been reduced to about a $5,000.00 overdraft, so they got $1,000.00. On the end of the 17th, the Fort Dearborn National Bank was overdrawn $10,000.00, the Exchange Bank of Spokane, $13,-

000.00 and the Coeur d'Alene Bank was about only $1,000.00 overdrawn.

Q. So the Coeur d'Alene Bank had $4,000.00?

A. Yes, then on the 18th, the end of the 18th, the Fort Dearborn was clear, the Exchange National Bank of Spokane overdrawn $14,000.00 and the overdraft in Coeur d'Alene was about the same, the Fort Dearborn——

Q. The Fort Dearborn had been paid off between the 16th and the 18th?

A. At that time we didn't do any active business with the Fort Dearborn at all, the only business was the renewal of Merill Cox notes. (75)

Mr. Adams: You didn't pay them any real money then at all?

A. No real money at all.

Mr. Adams: When the notes were in transit that would show an overdraft.

A. Yes, on the 19th the Fort Dearborn $5,000.00 overdraft, the Exchange National Bank of Spokane, $5,000.00 overdraft and the Coeur d'Alene Bank still about $1,000.00, and on the 21st the Fort Dearborn was still $5,000.00 overdrawn, the Exchange National Bank of Spokane, $6,000.00 overdrawn and the Coeur d'Alene Bank closed out so we have $5,000.00 overdraft of the Coeur d'Alene National Bank.

Q. You say closed out?

A. We closed out the account I say on that date.

Q. Then there was Six Thousand Dollars paid to the Coeur d'Alene Bank?

A. Six Thousand Dollars to the Coeur d'Alene Bank and the Exchange Bank of Spokane, started in with Eight Thousand and it was Six Thousand overdrawn at that time—$4,000.00 overdrawn at that time, so they got $4,000.00, that is $10,000.00.

Mr. Adams: You paid the Exchange Bank of Spokane Four and the Coeur d'Alene Six?

A. Yes, there was $12,000.00 in all. (76)

The difference if the First National Bank of Lincoln; I see on the end of the 10th the First National Bank of Lincoln is overdrawn to the extent of about $4,500.00 and by the 18th, we had that overdraft entirely wiped out. We must have used about $14,-000.00 for overdraft.

On February 12th, we paid to the agent of the Chicago, Milwaukee & St. Paul for freight $7,595.85 and there are some bills and salary accounts here I think. Little amounts to different creditors. The $1,000.00 item is the interest on notes that we renewed which we afterwards paid. After February 18th, 1916, all of the checks issued were in the name of the Stack-Gibbs Lumber Company and were signed by me together with another officer of the company. (77) On February 18th, I gave the Exchange National Bank of Spokane, my signature.

Now referring to the note register. Here on February 9th, we gave the Mechanics Loan & Trust Company eight notes for $5,000.00 each, Ninety days, drawn in favor of the Mechanics Loan & Trust Company, payable at the Exchange National Bank of Spokane; and on February 16th, there were three

more notes for $5,000.00 each, payable in the same way. (78) On February 16th, another one for the same amount and on the 24th another one for $5,000.00.

Q. That one February 24th, I suppose that was signed by you as Secretary?

A. I signed those on February 16th—I signed them the day I arrived in Spokane.

Q. How much?

A. $5,000.00.

There were four notes signed on the 16th and on February 26th, one for $5,000.00.

March 4th, $5,000.00; March 8th, $5,000.00; March 10th, $5,000.00; March 15th, $2,500.00; April 8th, $5,000.00; May 11th, $2,500.00;—that is all the notes which we issued in favor of the Mechanics. Beginning with February 16th, all these notes were signed by me. (79) We had two notes but they were made out to the Exchange National Bank of Spokane, direct of $2,500.00 each.

Mr. Post: When was that?

A. July 10th, No. 7521.

Mr. Adams: July?

A. One minute please, I am going to find it—they were made out at the Exchange National Bank, also on May 11th, but not the Mechanics Loan & Trust Company, No. 7494, No. 7495, $2,500.00 each, demand; all the other notes were ninety days.

Mr. Post: Do you know how those happened to be made out to the Exchange Bank?

A That is really a riddle to me, I do not know

how that was made; I believe we made out a demand note at the time because we thought we could take them up immediately and got it from the Exchange Bank of Spokane, that is why we made out demand notes.

Q. The renewals of that note were made out to the Mechanics Loan & Trust Company?

A. This demand note has never been renewed or taken up. (80)

The first $20,000.00 in notes were signed by me and in Mr. Coman's office and that is the last I saw of the notes, but the other notes we sent by mail into the Mechanics Loan & Trust Company.

Mr. Post: I show you a letter dated February 24, 1916, marked Exhibit 11 for identification and ask you whether or not, that is one of the letters you referred to as writing to the Mechanics Loan & Trust Company enclosing the notes?

A. That is correct.

Mr. Post: I offer this one in evidence, dated February 26th, Exhibit 12 and is also one of them? I offer the two letters in evidence. (81)

There was no objection to the introduction. The letter Exhibit 11 addressed to Mechanics Loan & Trust Company says: "We hereby hand you our note for $5000 for ninety days, the receipt of which you will kindly deposit for our credit in the Exchange National Bank. * * * We would appreciate it if you would place this credit at our disposal immediately, inasmuch as we need it tomorrow."

The letter of February 26, 1916, Exhibit 12, addressed to the Mechanics Loan & Trust Company, states: "We hereby hand you our ninety-day note for $5000, which you will kindly discount and place receipt to our credit in the Exchange National Bank on Monday. In accordance with the letter sent to Mr. Coman on February 23rd, we will draw on you until March 10th to the extent of $20,000. The note which you credited to us February 24th and today's note are against this loan, leaving a balance of $10,000 yet to be drawn."

Mr. Post: I offer in evidence a letter of February 19th to the Mechanics Loan & Trust Company marked for identification, Exhibit 13.

(And, no objection being made, it was received.)

This letter is signed by S. Katz, dated February 19, 1916, and says: "In reply to your request for daily bank report, will say that we are preparing to send out such reports to every bank interested. The first reports will go forward in a few days."

I sent out the report mentioned in those letters. I believe it was the Exchange Bank, the Mechanics Loan & Trust, the Fort Dearborn National Bank, I believe those three got it. Merrill Cox may have too but I am not positive about this. I remember I sent one copy of the payroll to the Mechanics Loan & Trust Company, only one, (82) but I did not send any such thing to Chicago. I had correspondence with Merrill, Cox & Company in February, March and April. I have copies of the correspondence. (84)

Mr. Post: I show you Exhibit 14.

The Witness: That is my signature; that is one of the original Trust Deeds.

Q. You remember you signed several of them don't you?

A. O yes, I guess I did.

Mr. Post: I wish to offer in evidence at this time this instrument.

Mr. Adams: In the first place, no foundation has been laid for its introduction and it is incompetent and immaterial; it does not appear that the people signing that agreement, that is, for instance, the Mechanics Loan & Trust Company, had any authority in the State of Idaho to enter into such a contract; the objections are all set forth in the written objections filed to this claim. (84) I am assuming that some place along the line, Mr. Post will connect up all those items and make them good. If it is admitted, subject to the objections filed against it, why then we can get along without delay and in the argument we can argue out whether Mr. Post has made out sufficient evidence to admit this contract or not.

Mr. Post: There are sometimes formal objections and sometimes substantial ones; and I do not suppose these gentlemen are going to object it wasn't properly executed or anything like that, but if they are I want to know it.

Mr. Adams: We certainly have and we have filed it in writing and I think you have a copy of it.

The Referee: I suggest you lay proper foundation for its introduction.

Mr. Post: On page 15 of this instrument appears your name signed as Secretary of the Stack-Gibbs Lumber Company and the Dryad Lumber Company, you signed it didn't you?

A. That is correct.

Q. And C. D. Gibbs as President of the Stack-Gibbs Lumber Company—you know his signature, he signed it in your presence didn't he?

A. I do not remember.

Q. You know that is his signature?

A. It looks like his signature.

Q. And B. G. Nelson, President of the Dryad Lumber Company, you know that is his signature?

A. Looks like his signature. (85)

Q You know the signatures of those two men?

A. Yes, I certainly do; I say it looks like them.

Q. And the seals attached thereto are the seals of those two corporations, you put them on didn't you?

A. No, I didn't put them on, but they are on.

Q. They are the seals of the corporation?

A Yes sir.

Q. Who did put them on if you didn't?

A. Mr. Cleland I believe.

Q And several copies of this were executed were they not?

A. Yes, quite a number of them.

Q. And you delivered one or more copies to the Mechanics Loan & Trust Company or somebody representing them?

A. I believe I sent them all to the Exchange National Bank.

Q. You think you sent them all down here?

A. Yes sir.

Q. You got one or more back that purported to be signed by the Mechanics Loan & Trust Company?

A. I did not, there were so many signed that I do not know what happened to them afterwards and what was done with them; I know all we signed we hadn't got—only those in the minute book.

Q. That is you got the one in the minute book?

A. Yes.

Q. Now the instrument I hold in my hand purports to be acknowledged February 29th, do you know whether that is correct or not?

A. Well it ought to be correct. (86)

Q. That is a fact, isn't it?

A. Why sure.

The Referee: You know the instrument was acknowledged on the day it purports to have been acknowledged?

A. Yes, pretty sure of it.

Mr. Post: I now offer it in evidence.

Mr. Adams: We still maintain our objection, that is only one of the parties to the contract.

Mr. Post: I will prove the execution if necessary, but it isn't necessary so far as binding these people is concerned; you gentlemen admit don't you that these creditors have signed it and that is their signatures.

Mr. Adams: I have stated that so far as the two clients I represent are concerned we would not raise any question as to their signatures so far as this

document was concerned, but in no other way do we admit the authority of any other person named in that document excepting to save the counsel for Petitioner the trouble of taking depositions.

Mr. Canfield: I admit Mr. Searle and Mrs. Gibbs signed it.

Mr. Post: You admit the signatures of the Fort Dearborn National Bank and Merrill Cox & Company to this paper.

Mr. Adams: For the purpose of this hearing only, yes.

Mr. Post: And you admit Searle and Gibbs?

Mr. Canfield: Yes.

Mr. Post: And Mr. Danson, you admit Mr. Hess?

Mr. Danson: I think so, let me see it.

Mr. Post: And Mrs. Tolerton?

Mr. Danson: Yes, I do not admit they signed on this date, however. (87)

Mr. Post: I will prove when they signed it.

Mr. Danson: Yes, I admit that is their signatures.

Mr. Post: You also admit the First National Bank of Lincoln, Nebraska, was Searle, don't you?

Mr. Canfield: Oh yes, undoubtedly.

Mr. Post: You are familiar with the signatures of the Shoshone Lumber Company and E. L. Carpenter are you not?

A. I am not acquainted with them, that is, the only time I have looked at their signatures is right now.

Q. Or J. K. Stack?

A. Yes, J. K. Stack's signature I know, that looks like his.

Q. I guess there is no question about it; I will supply the proof as to these other signatures.

The Referee: Very well. Without deciding the question of the admissibility at this time, it will be overruled and admitted.

Mr Canfield: I desire to object further on the ground that there is no showing here among our other objections, there is no showing that ninety per cent of them of the then existing creditors of the Stack-Gibbs Lumber Company signed that instrument; the instrument by its terms provides that it shall be absolutely no effect and shall not take effect until signed by ninety per cent of the creditors.

Mr. Post: That is on another question, not on the admissibility of the document but a question of the construction of it, and the effect of it.

The Referee: The ruling will stand.

(Whereupon the Trust Deed referred to was admitted in evidence, (88) and was marked Exhibit 14. This is the trust deed attached to the petition of Mechanics Loan & Trust Company and referred to in stockholders' meeting, Exhibit 3.)

Q. Did you at some time begin to act as the agent of the Mechanics Loan & Trust Company up there at Gibbs, Idaho, in relation to the Stack-Gibbs Lumber Company?

A. I would really like to know what you mean by agent in which respect before I can answer that question.

Q. Do you know what the word "agent" means?

A. It means in respect to.

The Referee: Tell what you did and leave it to the court.

The Witness: I took up the duties of Secretary-Treasurer of the Stack-Gibbs Lumber Company and the Dryad Lumber Company respectively.

Q. Did you have any conversation with anybody? Did you have any correspondence with anybody connected with the Mechanics Loan & Trust Company in relation to your taking up the duties of operating that business as the agent of that company?

A. Well, not with the Mechanics Loan & Trust Company, unless Mr. Coman is an officer of the Mechanics Loan & Trust Company. I do not know that.

Q. Did you have a conversation with Mr. Coman about it?

A. I talked with Mr. Coman about the affairs of the company frequently.

Q. Did you have a conversation with Mr. Coman about taking up the duties and performing the duties of representing the Mechanics Loan & Trust Company under this Trust Deed that has been put in evidence?

A. Well it was never specifically mentioned but we talked about it.

Q. When did you first talk about it?

A. I can't tell the date.

Q. How long had you been here before you first talked with Mr. Coman about it?

A I guess it was some time afterward.

Q. How long? (90)

A. Maybe that same week for all I know.

Q. What did he say to you on the subject of your taking possession up there for the Mechanics Loan & Trust Company and operating the plant under the terms of that Trust Deed that is in evidence here?

A. It was never put to me that way because I was never running the plant to begin with. I wouldn't have had the ability to do it at that time; they simply talked over the affairs of the company, especially from a financial standpoint only you might say.

Q. Did you have any conversation at any time with Mr. Coman about your being the man to carry out the duties of the Mechanics Loan & Trust Company under that Trust Deed as defined under that Trust Deed?

A. Well I do not remember—we talked about it, but I do not remember the Trust Deed mentioned any specific duties of myself.

Q. You do remember the Trust Deed provides that the Mechanics Loan & Trust Company shall take possession of the property and that thereafter—

A. I remember that.

Q. Sell it for the benefit of the creditors and in their discretion operate the mill, etc., you remember all that?

A. I remember that.

Q. Did you have any talk with Mr. Coman about your being the man on the ground who would be

the representative of the Mechanics Loan & Trust Company in doing those things whatever was to be done?

A. I suppose it was taken for granted, but he didn't point it out specifically. (91)

The Witness: After I came here, I remember Mr. Coman asked me the first question, "I guess you know what you have to do," and I said, "Of course I am the poorest informed man I ever knew for a job like this." I wasn't informed, I didn't know what I had to do about it and the only time I got it, got a real good look into that Trust Deed was when you brought it out to the mill. I do not know whether it was February 18th or not. I mean on the date of the stockholders meeting, (92) but at that time I looked at it and read it and considered myself, then I was the man to confer with Mr. Coman about those affairs.

Mr. Canfield: I move to strike out what he thought it was.

Mr. Adams: Yes, I make the same motion.

The Referee: I will let the matter stand, simply stating his feelings of relationship.

I noticed that my name was specifically mentioned in the Trust Deed. The Deed was drawn up in Minneapolis, that is, I don't know where it was drawn but I know it was talked over in Minneapolis. (93) I was told I was to be elected Secretary-Treasurer of the Stack-Gibbs Lumber Company. In regard to what I was told in Chicago in regard to the Trust Deed being drawn, this assignment for the benefit

of the creditors, part of it I was told and part I wasn't. I knew a trust agreement had been drawn but I didn't know it was an assignment for the benefit of creditors, didn't know those details, because I didn't see it until I came out here. Mr. Aaron told me about it in Chicago. (94) Mr. Aaron was the only man I talked about it with in Chicago. I formerly stated it was Mr. Tilden but I am now convinced that it was Mr. Aaron who talked to me about it. (95) Mr. Aaron told me that Mr. Gibbs had very bad luck in his business and that he was connected with either incompetent or dishonest people, that he needed somebody who knew finances and the lumber business and I was just the right man for it; that Mr. Coman was supposed to be the Trustee as I remember, called the Trustee agreement—it means to overlook the affairs of the company, that I should assist him. (98) After I got out here and talked with Mr. Coman, I remember distinctly, "I guess you know what you have to do." I told him that wasn't the case, I was not informed when I left, I had no—I didn't know my duties yet—and I would have to work into them and when I was out there for a while I would learn more about it; Mr. Coman evidently took it for granted that I knew. I was not informed as much as Mr. Coman thought. After that I had conversations with Mr. Coman and people connected with the Exchange National Bank and Mechanics Loan & Trust Company in respect as to what I ought to do. I do not remember that I had any talk with you, Mr. Post about it. (99)

Mr. Post: Didn't I tell you, Mr. Katz, when we were up there on February 18th, they passed that resolution authorizing this Trust Deed, you were there, would be there in possession as the representative of the Mechanics Loan & Trust Company to carry out the functions to be performed by it under that Trust Deed?

A. I am almost positive that you did not.

Q. Did I on any other occasion say that to you?

A. I do not think I ever met you again outside of that meeting outside of one occasion which I had nothing to do with.

I had some correspondence with the Mechanics Loan & Trust Company in relation to the subject. That correspondence ought to be here. Here is one that refers to it. I see that the letters are all mixed. Here is a letter you were asking about, March 23rd, that is when I got that letter you referred to, (100) and here is a letter of March 24th from them.

Mr. Post: I offer in evidence these two letters, Marked Exhibit 15 and 16. Exhibit 15, admitted in evidence, is a letter dated March 23, 1916, from J. V. Rea, Manager, Mechanics Loan & Trust Company, to S. Katz, stating that he encloses a copy of a letter received from Attorney F. T. Post outlining the duties and responsibilities under the trust deed and asking Mr. Katz to prepare a general inventory as of the date "we assumed control under the trust deed," also a statement of all cash receipts "since we have been in charge," and the source of payment and nature of debt; a statement of all disbursements, segregated in certain ways; also a copy of the pay-

roll each pay-day. The attorney's letter to the trust company dated March 17, 1916, states that the trust deed provides for immediate possession of the property, and "that you have already done through the person of S. Katz, your agent." It advises that a letter be received from the Stack-Gibbs Lumber Company stating that it recognizes Mr. Katz as the agent of the trust company and that the latter is in possession of the property. It advises the obtaining of an inventory of the assets, a trial balance of each company, a statement of the moneys on hand at the time the trustee assumed the trust, and that the trustee should have from its agent at frequent intervals reports showing the business transacted, trial balances, etc.

Exhibit 16 is a letter signed by Mr. Katz to the trust company, dated March 24th, acknowledging receipt of the two letters constituting Exhibit 15, stating: "In reply, I wish to say that I will be in Spokane next week and talk over with you the manner of keeping you instructed about the transactions of the two companies, as well as about all other matters;" also stating, "I want to hand you two letters from the Stack-Gibbs Lumber Company and the Dryad Lumber Company in compliance with paragraph 1 of Mr. Post's letter."

The Witness: I believe that I wrote another letter in response to the letter of March 23rd on March 31st in relation to this same subject. (101) The two letters that I have just handed to you were signed by the President and not me, however.

Mr. Post: I offer in evidence Exhibits 17 and 18. Each letter is dated March 24, 1916. One is signed by the president of the Stack-Gibbs Lumber Company, and the other is signed by the president of the Dryad Lumber Company, and each letter is addressed to the Mechanics Loan & Trust Company and states: "I hereby wish to inform you that we recognize Mr. S. Katz as your agent, in compliance with the trust agreement of the creditors of our company dated February 1, 1916."

(No objection.) I also offer in evidence a letter of March 31st which is marked Exhibit 19. (No objection.) This is a letter dated March 31st to the trust company, signed by Mr. Katz, stating: "In further compliance with your letter of March 23rd in regard to Mr. Post's letter, I hereby hand you two letters in reference to paragraph 2 of his letter, asking for inventory of the assets of the two companies."

Mr. Post: I offer in evidence two letters marked Exhibits 20 and 21.

(Which were admitted without objection.) (103) Exhibit 20 is a letter dated March 31, 1916, signed by Stack-Gibbs Lumber Company, by Gibbs, President, and Katz, Secretary, and begins: "I hereby wish to give you a list of the assets which we turned over to you on February 1st as trustee for our company." The figures in the letter as to assets according to books show the value thereof to be $1,440,526.10.

Exhibit 21 is a similar letter in relation to the assets of Dryad Lumber Company.

The Witness: Within six or seven days after I got here, I sent to Mr. Rea, secretary of the Mechanics Loan & Trust Company, a daily statement of the cash receipts and the nature of the debts paid. I sent these to him every day and I sent them the same statements that I sent to the bank. Yes, I sent them to the Fort Dearborn National Bank and the Exchange Bank and I believe to Merrill, Cox & Company. I didn't bother afterwards where they went to, they were mechanically sent out of the office. (104) The paper that you hand me is the kind of a statement that I sent out on February 21st, 1916, and the kind that I sent daily to those people.

Mr. Post: I offer this statement in evidence marked Exhibit No. 22. (No objection.)

The Witness: In regard to the correspondence that I had with the Mechanics Loan & Trust Company, the letters passed between the Mechanics Loan & Trust Company and Stack-Gibbs Lumber Company, I personally didn't get any letters; but I saw them all. (105) This seems to be the first letter February 19, that came from the Mechanics Loan & Trust Company, and that one I gave you seems to be the first one that my signature was attached to. I mean, that is the first letter after I arrived. There does not seem to be any letters between February 1st and February 19th. This seems to be the first letter in the month of February, February 18th, 19th and 21st; they are all February letters every one of them, and these are the earliest letters. The letter you hand me I think is the first I wrote to them. Now in regard to my correspondence with the

Merrill, Cox & Company, I did not keep any copies of the letters I wrote to them, but I wrote a few letters to them at various times. (107) That is my private correspondence. I took good care to throw it away as soon as I wrote a letter. I didn't keep copies. I showed Mr. Coman a copy of every letter that I wrote to them and this included even my private correspondence, but I did not keep any copies. I sent either Merrill, Cox & Company a copy or I occasionally addressed a letter to Merrill, Cox & Company and gave Mr. Coman's copy of it; the reasons I didn't keep those copies was I didn't want anybody in the office to see them. I had no confidential correspondence with the Fort Dearborn National Bank. (108) I did not keep the letters I received from Merrill, Cox & Company either. Mr. Weinstein did not get any of this correspondence either and I do not believe that he saw it. (109)

Mr. Post: I offer in evidence two letters marked Exhibits 23 and 24. (No objection.) Exhibit 23 is a letter dated March 7, 1916, from Mr. Katz to Mr. Coman, stating that he encloses a copy of a letter which was written to Chicago.

Exhibit 24 is a letter dated March 7, 1916, from Mr. Katz to Merrill, Cox & Company, stating a list of expenditures made and to be made, and followed with: "So far, of the $100,000 additional credit, we have used up to March 1st $70,000 leaving a borrowing capacity of $30,000 against a shortage of $37,500."

Q. Did you get a wire from Merrill, Cox & Company?

A. I did. (111)

Mr. Post: I offer in evidence telegram as follows: "March 13, 1916, Stack-Gibbs Lumber Company, Coeur d'Alene, Idaho. Satisfactory us and Fort Dearborn to postpone payment interest writing, Merrill, Cox & Company."

The Witness: Merrill, Cox & Company confirmed the telegram by letter and I showed the letter to Mr. Coman. It was written to the Mechanics Loan & Trust Company and related to this matter.

This letter was marked Exhibit No. 25 and introduced and admitted in evidence. (112) Exhibit No. 25 is a letter from Merrill, Cox & Company to Mechanics Loan & Trust Company, dated March 20, 1916, stating that they have received a letter, quoting a letter from Mr. Katz in regard to the postponement of payment of interest on the obligations of Stack-Gibbs Lumber Company and "we have already written Mr. Katz, agreeing to this proposition."

Mr. Post produced a letter marked Petitioner's Exhibit No. 26 and introduced it in evidence without objection. This is a letter dated March 14, 1916, signed by Mechanics Loan & Trust Company and Exchange National Bank, addressed to Stack-Gibbs Lumber Company and Dryad Lumber Company, C. D. Gibbs, Merrill, Cox & Company, Fort Dearborn National Bnk, I. F. Searle, Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve Hess Tolerton and Mrs. M. A. Gibbs, and states that on February 18, 1916, the trust company wrote a letter to each of said parties

that paragraph 20 of the trust deed contained an ambiguity as pointed out by the attorneys, and that the intention of said paragraph was to a certain effect, and asking each of said parties to return a letter agreeing to the statement contained as to the intention of said paragraph 20, and further stating that the trust company had received from each of said parties a statement agreeing as to the intention of said paragraph 20, and further stating that the bonds issued by the Dryad Lumber Company referred to in the trust deed are owned by the Exchange National Bank, and that the maturity thereof is extended for the period of two years, as provided in said paragraph 20, according to its intent and meaning, as agreed upon.

Mr. Post: Now Mr. Katz, you have already testified to the disbursement of $60,000.00 of the money obtained from the Mechanics Loan & Trust Company and I desire to go on from that point as to what was done with the $40,000.00 after that?

Mr. Adams: I desire to make an objection to the statement of counsel that Mr. Katz testified what was done with the $60,000.00. Mr. Katz testified to certain payments—whether that was $60,000.00 received from the Exchange National Bank I submit the evidence does not show. (114)

Mr. Post: I had him verify their correctness by going through the books starting in with the refund payment to Bardwell-Robinson, and Lambert Lumber Company, logging contract, pay-roll, bank overdrafts, etc.

Mr. Adams: You had him verify certain items

here paid by the Stack-Gibbs Lumber Company, but the witness did not testify that they were paid out of the $60,000.00.

The Witness: Not all of them, I just picked out the amounts you told me, I do not know whether every item is down here—if I would know exactly where the money went I would have to read every item one after another and classify them afterwards; the same thing with the $40,000.00; that extends over a period—the last I think you said was May 11th, I am sure we paid out during this time something like $300,000.00; the $40,000.00 wasn't the only money we got in and it would be impossible for me or anybody else to tell where those $40,000.00 went; they went in with the other money we received.

Mr. Post: We will go back to this subject; this letter says that during this period the time from February 10th to February 22nd, in addition to the $60,000.00 (115) you received from shipments the sum of $8500.00; I want you to tell me whether that is true or isn't true?

A. I will look it up.

The witness here detailed various receipts by the Stack-Gibbs Lumber Company. (116)

Mr. Post: Now the period following that, how are we going to get at the matter of the next $40,000.00?

A. Well I think it is an impossibility; I explained the matter to Mr. Coman and got his consent to draw the rest of the money out; now why we were short and what we paid with it, we paid all kinds of things

with it, we paid notes, we paid pay-rolls, we paid—well almost everything; it went in all kinds of channels, that money and to separate it (118) is impossible; in fact, the $40,000 is a small part of those receipts we had during those months because we were shipping about $150,000 a month.

Q. When did you borrow the first money after February 22nd, was there any more borrowed in February between that time and March 1st?

A. Yes sir.

Mr. Adams: This is in the record once and I do not want to go to the expense of having the record written up twice.

The Witness: After February 22nd?

Mr. Post: Between that and March 1st.

A. February 24, one, February 26—

Q. So there was $10,000?

A. $10,000.

Q. Can you testify in the same way as to what happened to that $10,000 making up a statement?

A. Oh yes, I can in other words show all the receipts between February 22nd and February 29th and all the expenditures and classify it. (119)

Q. Starting with March 1st and the next ten days or two weeks, how much money did you get by borrowing from the Mechanics Loan & Trust Company?

A. March 4, $5,000; March 8, $5,000; March 10, $5,000.

Q. There is ten days, can't you make up a statement for that ten days also?

A. Surely, you mean a separate statement?

Q. That is up to $85,000 now March 10th or for the next ten days of the first of April what did you borrow?

A. March 15th we borrowed $2500 and I think that was all in March, but of course this $2500 is only a minor part of what we got in, that period.

Q. When did you next borrow some money?

A. April 8th, $5,000.

Q. As I understand you, when you got in the hole sufficiently so that you felt you needed to borrow some money, about that time you went to Mr. Coman or the Mechanics Loan & Trust Company and got it?

A. I went to Mr. Coman.

Q. So I judge on April 8th you must have been in the hole?

A. Evidently.

Q. You can tell what happened to that $5,000 can't you?

A. Yes we spent it.

Q. But you can tell where you spent it and you can tell what your balance was April 8th when you got that money?

A. I can only tell you that after I got the $5,000, I can give you a list of what was spent or the next $5,000 that was spent, but those $5,000 might not be the $5,000 because evidently we had other receipts.

Q. But you can tell what happened for two or three days of your receipts and expenditures?

A. I can give you a list of what we took in and spent.

Q. All right, do that.

A. For what period?

Q. When was the next date after April 8th you got more money?

A. I think it was May 11th; I remember it from this morning, $2,500.

Q. You got two Twenty-five Hundred Dollars May 11th?

A. No, from the Mechanics we got $2,500 and from the Exchange Bank we got $5,000. (121)

The Witness: I wasn't asked anything further; we borrowed July 10th from the Exchange National Bank, $5,000 and paid it back the 12th of July and the 15th of July $2,500 each. Mr. Coman let us have that money for a few days.

I have not my correspondence with the Fort Dearborn National Bank here but I will have it here Monday for you.

Whereupon an adjournment was taken until 9:30 A. M. Monday, January 8, 1916. (123)

The witness, Katz, was temporarily relieved from further testimony while other testimony was taken.

Thereupon William H. Kaye, being called as a witness on behalf of the Mechanics Loan & Trust Company, after being duly sworn, testified as follows:

TESTIMONY OF WILLIAM H. KAYE.

Direct Examination.

Examined by Mr. Post:

My name is William H. Kaye. I live in Spokane and am the Assistant Secretary of the Mechanics

Loan & Trust Company, having held that position for about three years. The paper marked Exhibit No. 26 is a letter that was signed by me as Assistant Secretary of the Mechanics Loan & Trust Company. On March 14, 1916, I sent that letter to the different people to whom it is addressed, in the usual way. I knew their addresses (127). At that time Mr. Huntley was President of the Mechanics Loan & Trust Company and still is. He signed the trust deed as President of the Mechanics Loan & Trust Company and I signed it as Assistant Secretary and attached the corporate seal. We both acknowledged the instrument in the usual way, before a Notary Public, Mr. Flood.

Cross Examination.

By Mr. Adams:

I do not recall the day that we signed the Trust Deed but it was the same day it was acknowledged before Mr. Flood. The instrument appears to have been signed on February 29, 1916. I saw Mr. Huntley sign it. (128) I did not talk with Mr. Coman at the time we executed it.

Witness excused. (129)

Siegmund Katz, being recalled for further

Direct Examination.

By Mr. Post:

The Witness: After we adjourned, I found the figures a little different from February 10th to February 22nd and I have made out a schedule of that. This is it, February 10th to 21st inclusive; I believe I can explain it to you better by reading it to

you. Referring to my letter dated February 22nd, Exhibit 10, the sum total of disbursements set forth in that letter is $68,500.00 but I find the same should be $76,000.00. I find it to be $76,000. I do not know if I told you the last time, at that time the auditors were here and there was nothing posted and the trial balance for February didn't get through until the 18th of March and I am inclined to think when Mr. Cleland gave me those figures I could not check them up just coming here, gave them to me out of his memory because I even find of the $60,000 which we borrowed up to February 22nd, they had received up to February 22nd only credit for $55,000; the other $5,000 wasn't credited until February 24th and what I have gotten up here is absolutely correct because I got it from the books as they were posted. (130) The auditor was Mr. Treiber of William Weber Company, a Chicago concern. I do not know who sent him here; I remember Mr. Gibbs told me he was once around previously and made such an impression on him and engaged him again. Referring to this statement, my letter, Exhibit 10, all of the accounts are correct but as to the pay-roll, I couldn't tell out of the book, we have only an amount there to the Dryad Lumber Company.

Mr. Post: That would be the same thing wouldn't it?

A. No, it is not exactly, it is the pay-roll and bills for supplies for the mill. (132)

The Witness: That amount is $18,500, while in the letter, Exhibit 10, it is $18,200.00. There was

no bank overdraft back—there was a bank balance of February 10th, $8,693; then there was overdraft of $6,000, consequently instead of the bank's balance decreasing there is a difference of $15,000 paid to the bank, or $14,600 to be correct, and it seems there is a note or two notes of the Exchange National Bank in Spokane, one of $10,000 and one of $5,000. They were paid on February 15th. In reference to when they were given, I will have to look up in the book, the bills payable; December 30, 1915, notes No. 7366 and No. 7367, first one $10,000, next one $5,000, demand notes. It was paid already on the 15th day before I came, in fact it is the first time I knew about it when I went over the books. (133)

Mr. Post: What makes up that item of $12,000?

The Witness: I suppose that meant the note in Spokane, I can't see it any other way because on February 10th when you take the balance of the banks we had on hand in the banks $6,893 and February 22nd at the end of this report, we were overdrawn in the bank at Spokane $6,000 according to our books. The freight on logs seems to be $7,595.85, the interest is $2,000 and the accounts payable interest, about $1,000. In my former statement I found the item, salary, $1,608.71 wasn't in there which was paid during that period of time and according to my books, the total amount paid during that period of time was $76,380.59. The amount received from all other sources except the Mechanics Loan & Trust Company, was about $6,000, and the balance which we had on hand, about $8,600, alto-

gether we had $14,000 at our disposal aside from the loan. (134)

Q. And Fourteen Thousand from Seventy-six leaves Sixty-two Thousand or something like that, and the loan was Sixty; is that correct?

A. No, the loan during this time according to our books was only Fifty-five; the notes must have been held in the Mechanics Loan & Trust Company and we must have written them to credit us with them, $20,000 notes here given the Mechanics Loan & Trust Company when Mr. Gibbs was in Spokane on the 16th of February and I do not find we were credited with them immediately; we were credited with them as we needed the money.

The Witness: Now, the next period of time, I then took up the receipts and expenditures including February 22nd. Up to the end of the month, February 29th inclusive; during this time, we received in loans $14,930 from the Mechanics Loan & Trust Company, I guess in one note the interest was deducted immediately. The sales amounted to $7,308 and a little freight claim, $38.00, total $22,-276; overdraft $6,000 to be deducted from that, leaves for disbursement $16,276. The overdraft which we had on the day previous, February 21st. It was paid during this period between February 22nd and February 29th. (135) There was an overdraft at the Exchange National Bank. Aside from the overdraft, we paid $16,276 in the following way; salaries and expenses $276, interest $3,325, for the Dryad Lumber Company $3,750, accounts payable, $535, freight on logs $1,262, log contrac-

tors $3,918, and we paid three notes of $2,505, one the Exchange National Bank note, $1,002, and one Fidelity National $1,003 and $500 Spokane & Eastern Trust Company and we paid the Mechanics for Mrs. Tolerton $350 to be sent to Mrs. Tolerton. That makes a total of $16,276. There was nothing left at the end of this period; about $1,000 was left maybe; the next period I took up was March 1st to March 10th, inclusive, loans Mechanics Loan & Trust Company $15,000, three notes; there were sales from which we collected $6,770 and a few other items $173; had a balance of $1,000 on hand yet, so that left for disbursement $22,943; our expenditures were as follows during that period, Dryad Lumber Company $12,000, for pay-roll and supplies, accounts payable $880. That was for various little bills; logging contractors $5000; interest $147; freight on logs $2,792 and salaries $1,202, making a total of $22,221. (136)

Now in reference to the letters that I wrote to the Mechanics Loan & Trust Company, the earliest letter that I have here is February 18th.

Mr. Post: I have one here of February 17th; I will show you this one of February 17th, that is Mr. Cleland's handwriting is it not, letter sent to the Mechanics Loan & Trust Company?

A. Yes.

Q. You got the copy there of one sent February 18th have you?

A. Yes.

Q. And February 21st, and is that all during the

first period 10th to 22nd you find in the correspondence?

A. Yes.

Mr. Post: I offer these three letters together as one exhibit.

Whereupon the letters were admitted in evidence as Exhibit No. 27. One letter is dated February 17 to Mechanics Loan & Trust Company and states: "Herewith our ninety-day notes Nos. 7414 and 7415 for $5,000 each, which kindly discount, depositing proceeds to our account at Exchange National Bank, Spokane, Washington, advising us of the amount of discount."

One letter dated February 18th to said trust company states: "Herewith our ninety-day note No. 7416 for $5,000, which kindly discount, depositing proceeds to our account at Exchange National Bank, Spokane, Washington, advising us of amount of discount."

The other letter is dated February 21st to said trust company and states: "Herewith our ninety-day note dated February 16, 1916, due May 16, 1916, for $5,000, which please discount, depositing the amount to our credit in Exchange National Bank, Spokane."

Q. The next period we were to take up February 22nd to February 29th? Do you find any letters in that period?

The Witness: That is all (handing them to him).

Mr. Post: I offer this one in evidence, this one of February 26th, sending a note for $5,000 and

saying, "Will draw on you until March 10th to the extent of $20,000," signed by Mr. Katz.

The letter was admitted to evidence and marked Exhibit No. 28. This is a letter dated February 26th to said trust company and states: "We hereby hand you our ninety-day note No. 7432 for $5,000, which you will kindly discount and place proceeds to our credit with the Exchange National Bank on Monday. In accordance with letter sent to Mr. Coman on February 23rd, we will draw on you until March 10th to the extent of $20,000. The note which you credited to us February 24th and today's note are against this loan, leaving balance of $20,000 yet to be drawn."

The Witness: I have two letters between March 1st to the 10th.

Mr. Post: I offer these four letters as one exhibit.

Four letters as Exhibit No. 29 were admitted in evidence. (138) One letter dated March 1st to said Trust company states: "Last Saturday we sent you our note for $5,000, asking you to place the proceeds to our credit with Exchange National Bank. Up to date we have not received any notice that the proceeds of this note were credited to us. We have already drawn against this amount under the presumption that we would receive credit immediately upon receipt of the note, and we are afraid that our checks will be turned down."

One letter is dated March 8, 1916, to said trust company, and states: "We hereby hand you our note of $5,000 for ninety days and will kindly ask you to

credit us with proceeds of same at Exchange National Bank, Spokane."

One letter is dated March 8, 1916, to said trust company, and states: "We hereby hand you our note for $5,000, the receipt of which you will credit to our account with the Exchange National Bank."

The other letter is dated March 10, 1916, to said trust company and states: "We hereby hand you our note for $5,000, receipt of which you will credit as usual to our account with the Exchange National Bank. We wish you would kindly attend to this today because we want to draw it for our payroll."

Q. At the conclusion of the reading of the last letter as follows, "wants the money next day for the payroll," that is the way you understood it at that time?

Mr. Katz: Surely.

Q. Going back to your figures, the next period is March 10th up to what time?

A. I stopped on March 15th; you told me from the day you got the loans until afterwards—on March 15th.

Q. You gave a note for $5,000?

A. No, $2,500, so I have given from March 15th to 18th inclusive; during this time received from sales $6,483 and loans $2,500, as the loan register mentions, total receipts $8,983; expenditures during that same period were for Mrs. Tolerton $350, loggers $1,364, Dryad Lumber Company $1,725, accounts $349, salaries $333 and freight on logs $2,387, total $6,583, left a balance in the bank of $2,000.

Q. Why did you want that $2,500?

A. I do not know any more, but evidently we expected to pay something that didn't come in; it was spent all right afterwards because we borrowed some more money, the reason was I got tired of having only five or ten cents in the bank, wanted to have a little balance in case something came in; on the day I borrowed we undoubtedly had no money on hand at all and the receipts came in in excess of what I expected—one of the exceptions.

Q. When was the next period there—the next period is the time you borrowed some more money I suppose?

A. Yes, April 8th, April 8th to 12th inclusive; received from the Mechanics Loan & Trust Company $5,000, through sales $6,941 and a few other small items $135, total $12,076; we paid to logging contractors and our own logging at the time, $2,345, accounts $28, salaries $1,120, Dryad Lumber Company $7,350, Mrs. Tolerton $350, freight $67, total $11,460, leaving a few hundred dollars in the bank.

Q. On April 8th you wrote them a letter did you not? (139)

A. I haven't got it here, you must have that. It starts here May 8th.

The Witness: I considered it necessary to get this money to cover the payrolls.

Mr. Post: I offer a letter in evidence.

It was admitted and marked Exhibit No. 30. This letter dated April 8, 1916, to Mechanics Loan & Trust Company, says: "Enclosed please find our note for $5,000, the proceeds of which you will kind-

ly deposit for our account at the Exchange National Bank. We will appreciate it if you will attend to the receipt of this letter, as proceeds are necessary to cover payroll."

The Witness: The next was May 11th, covering the period from May 11th to 15th inclusive, received loans Mechanics Loan & Trust Company $2,500, Exchange National Bank $5,000, total $7,500; besides this we received from sales $11,-936, $72 through another item, total $19,508. I mean the Exchange National Bank of Spokane. Dryad Lumber Company, $16,100 for pay-roll and supplies, notes $880 Stanton Meat house, $686 freight on logs; $547 logging contractors and our own logging; $936 salaries; a total of $19,149. (140)

Q. You got Exchange National Bank, May 11th, $5,000, do you know how that happened?

A. Yes, I remember now, I saw Mr. Green at the Exchange Bank, and I think Mr. Coman was out of town at the time, and I expected the receipts would come in right away so I said I would have to take up the last $5,000 and I would rather get $2,500 on demand notes and the receipts would come in, but the receipts didn't come in, and that is how it was in the name of the Exchange Bank instead of Mechanics Loan & Trust Company. As to what I understood in regard to this loan, I do not remember any more what I said about it. I thought we would get it only for a few days and pay it back, so Mr. Green gave it to me from the Exchange Bank in demand notes; it happened even a few times after that.

Q. Start looking over these notes. I want to know whether the last notes given to the Mechanics Loan & Trust Company or to the persons named therein—

A. These are the unpaid notes, $100,000.00.

Q. Those notes I hand you are the unpaid notes, these are the last ones?

A. Yes sir.

Q. And they have not been paid in whole or in part?

A. No.

Q. And they are all signed by you are they not?

A. Yes sir.

Mr. Post: I offer them in evidence with the privileges of withdrawing them.

The Referee: It is understood that you will substitute copies.

Mr. Post: We have got copies already attached to our proof of claim.

The notes referred to were admitted in evidence as one exhibit, 22 in number, marked Petitioner's Exhibit 31 and admitted. (143)

A brief description of said notes is as follows:

Eight notes, dated May 9, 1916, each payable to the order of Mechanics Loan & Trust Co., and each is signed "Stack-Gibbs LumberCompany, by C. D. Gibbs, Pres., by S. Katz, Secy.; each is for the principal sum of $5,000, and the interest rate is six per cent, and each is endorsed as follows: "Without recourse, pay to the order of............Mechanics Loan & Trust Co., W. H. Kay, Assistant Secy."

Three notes dated May 11, 1916; each signed same as the others, except in place of C. D. Gibbs, Pres., appears H. F. Cleland, Vice President. Each is for the sum of $2,500. One is payable to the order of Mechanics Loan & Trust Company, and the others payable to the order of the Exchange National Bank of Spokane. Each note is endorsed on the back: "Without recourse, pay to the order of............Mechanics Loan & Trust Company, by J. V. Rea, Secy."

Four notes dated May 16th, 1916, each is for the sum of $5,000; interest rate six per cent; each payable 90 days after date to the order of the Exchange National Bank of Spokane, each signed the same as the others, and each endorsed on the back thereof the same as the others.

One note is dated May 24, 1916, payable 90 days after date, for $5,000, to order of Mechanics Loan & Trust Co., interest 6 per cent, signed and endorsed same as the others.

One note dated May 26th, 1916, for $5,000, payable 90 days after date, to the order of Mechanics Loan & Trust Co., six per cent interest, signed and endorsed the same as the others.

One note dated June 5th, 1916, for $5,000, payable 90 days after date to order of Mechanics Loan & Trust Co.; six per cent interest, signed and endorsed the same as the others.

One note dated June 6, 1916, for $5,000, payable 90 days after date, to the order of Mechanics Loan & Trust Co., signed and endorsed the same as the others.

One note dated June 8, 1916, for $5,000, payable 90 days after date to the order of Mechanics Loan & Trust Co., six per cent interest, signed and endorsed the same as the others.

One note dated June 13th, 1916, for $2,500, payable 90 days after date, to the order of Mechanics Loan & Trust Co., six per cent interest, signed and endorsed the same as the others.

One note dated July 7th, 1916, for $5,000, payable 90 days after date, to the order of Mechanics Loan & Trust Co., signed and endorsed the same as the others.

Mr. Post: I offer in evidence as one exhibit all the cancelled notes of the Mechanics Loan & Trust Company.

Whereupon the notes referred to, nineteen in number, were admitted as one exhibit and marked "Petitioner's Exhibit No. 32" and admitted.

Said Exhibit is briefly described as follows:

Nineteen (19) promissory notes, each for the sum of $5,000, each payable to the order of the Mechanics Loan & Trust Company, each bearing interest at the rate of six per cent per annum, each endorsed: "Pay to the order of............without recourse. Mechanics Loan & Trust Company, by J. V. Rea, Secy."; each by its terms due ninety (90) days after date; eight (8) of said notes being dated February 9th, 1916, and signed Stack-Gibbs Lumber Company, by C. D. Gibbs, Pres.; four (4) of said notes are dated February 16th, 1916, signed Stack-Gibbs Lumber Company, by C. D. Gibbs, Pres., by S. Katz, Secy.

Seven (7) of said notes, dated respectively, February 24, February 26, March 4, March 8, March 10, March 15, and April 8, 1916, said seven notes being signed Stack-Gibbs Lumber Company, by C. D. Gibbs, Pres., by S. Katz, Secy.

Each of said notes bears the cancellation stamp of the Exchange National Bank dated as of the date when the renewal note was given.

Q. From the time that you arrived there at Gibbs, Idaho, to the time that this concern was thrown into bankruptcy, you were very active and energetic in the management of that business, weren't you?

A. Well, I was working together with Mr. Gibbs and consulting with Mr. Coman.

Q. What I am getting at is, you were very active and energetic; you were Johnny-on-the-spot all the time?

A. I think I was.

The Witness: At the time I came here, we owed the Atlas Tie Company to the amount of about $10,000 or $11,000. The way we paid it off was not through cash payments but through the sale of logs; they were manufacturing ties from a cheap grade of fir and tamarack, and this amount we owed them was part of an advance on those logs and the advance was evidenced with notes and whenever we shipped the logs we were credited on those notes. On January 1st it was $17,274.42, and when I got here in February it was reduced some and the rest of it was paid off by logs.

Q. I wish you would turn to the account of the First Security National Bank of Minneapolis, and see how much was owing them when you came here.

A. It was bills payable $25,000 we owed them—it was not through an open account, they were cancelled through a mutual agreement in Minneapolis in that meeting I understand, at least I was told when I came, there was a Trustee Fund called the C. D. Gibbs Trustee Fund, $112,000 on the books which was supposed to represent their interest in the timber land and he bought at one time as scrip, I believe for the First Security National Bank of Minneapolis (144) in favor of Shevlin-Carpenter people; they made an agreement that Mr. Gibbs should forego his interest in that and that on the other side they would take up those notes themselves and consequently the notes were canceled so far as the Stack-Gibbs Lumber Company was concerned.

Q. You understood that it was fixed up in Minneapolis that way at the creditors' meeting in January or February whenever it was?

A. That was told me when I came and consequently the $25,000 was stricken out of the books and as assets the $112,000 was stricken out of the books, by a reduction of the book assets of about $87,000.

CROSS-EXAMINATION.

By Mr. Adams:

The Witness: The renewals of the notes about which I have testified, were not delivered personally but I think were sent by mail, but I talked about the

renewals to Mr. Coman occasionally. I would quite often go in and see him (145). The initials on the notes, O. K. E. T. C. was the signature of E. T. Coman, the same gentleman that I talked to. Upon my arrival in Spokane on February 16th, I saw Mr. Coman at the bank on my second visit there. The notes that you are showing me, I signed on February 16th in the afternoon, (146) at Mr. Coman's office. Those notes were signed on the third visit I made to the bank that day; I made three visits. On the second visit I made an appointment with him, and about half past four in the afternoon after Mr. Gibbs had come to the bank and when I came back Mr. Gibbs and Mr. Coman were together already and then I was asked to sign those notes that you have just shown me. There was nothing said at the time except a few introductory remarks. Mr. Coman told me that Mr. Gibbs was a very able man, that he was especially a great lumber salesman and I should try to get along with him tactfully. The whole tone of the conversation and subsequent conversations was to get the confidence of the people and get their friendship and find out what is due the (147) firm and get along the best I can, getting the company in the best shape possible.

Q. You find an item on the 15th of $15,000 credited to the Exchange National Bank; when was your attention first drawn to that item?

A. Practically this morning when I looked through the books; I saw at a glance when I talked to you on Saturday—

Q. Who do you refer to by you?

A. Mr. Post, and we talked about that something must be wrong and I looked over it and that item of $15,000; when I read those figures out of the books I wasn't asked about it and I didn't mention it.

Q. Was that a part of your first $40,000 paid out of those notes that we discounted?

A. It must have been.

Q. How was the balance of that overdraft made up of $6,000; wasn't there a $5,000 note discounted a few days afterward which helped make up this $6,000 overdraft, which helped to pay the Exchange Bank?

A. There was still an overdraft left.

Q. While that overdraft was left did you put in another $5,000 note?

A. Yes, in order to square that overdraft we put in another $5,000 note on February 24th.

Q. One of those same notes, this note of February 24th that was canceled and afterward renewed?

A. That is correct (148).

Q. Did you write the Fort Dearborn that you had found $15,000 of notes of the Exchange Bank that you had paid?

A. I did not write it to anybody, I did not know it.

Q. There had been an entry made on the books showing all the money paid out for that purpose at that time?

Mr. Post: What purpose?

Mr. Adams: To pay the Exchange Bank out of this $40,000?

A. It shows here an entry in the check register.

Q. When was that put on there?

A. February 15th.

Q. Was it actually entered on February 15th?

A. Yes.

Q. How did you happen not to see it then, Mr. Katz?

A. Because I never looked at the books then at that time, I wasn't here on February 15th.

Q. On February 16th did you look at it?

A. No, I do not think anything was posted in the books until the end of the month.

Q. That is what I understood you to say?

A. The whole month of February there was nothing posted in the books.

Q. It wasn't on there February 16th when you got there?

A. No, there was nothing on there for the whole month of February, I remember that. (149.)

Q. Has the Exchange Bank ever accounted to you or the Stack-Gibbs Lumber Company for any $15,000 security or anything of that kind since you have been here?

A. No.

Q. Have they turned back to you $15,000 on account of that item of $15,000?

A. Not that I know of.

Q. Did they give you the canceled notes representing that $15,000?

A. Well, after I saw—I went to the office yesterday to see if I could find it and I can't find them, and they were not there; there is a whole file of canceled notes there from that period and those two notes were not there.

Q. Does the entry of the original notes show in the bills payable?

A. They show December 30, 1915.

Q. And the numbers?

A. Yes, sir, with the numbers.

Q. Give us the numbers of those notes for the record?

A. No. 7366, $10,000; No. 7367, $5,000.

Mr. Adams: We would like to have Mr. Post or Mr. Coman within reasonable time produce those two notes.

The Witness: In regard to my testimony of writing certain letters to Merrill, Cox & Company, certain confidential letters, I wrote three or four and went into the Davenport Hotel, but I went as a rule to Mr. Coman's private office (150) and he had a lady secretary and dictated my letters, and one time I remember Mr. Coman was not able to give me the stenographer and I went to the Davenport Hotel. How I happened to go to Mr. Coman's office, as Secretary and Treasurer I wasn't supposed to make reports to anybody without the consent of the President or at least with his knowledge, and I didn't feel that there was any official Secretary-Treasurer, it was something of a private nature and Mr. Coman was supposed to handle the affairs here as Trustee and I thought he ought to know about it before anybody else and for this reason I went to his office and dictated the letters there; in some cases I believe I kept a copy and threw it away then and in other cases I didn't keep a copy at all, simply gave one to Mr. Coman and sent one along; any way Mr.

Coman always saw the letters before they left. He consented to everything that I wrote. I remember I wrote only once a confidential letter to J. D. Finley also in Mr. Coman's office, but Mr. Coman censored it at the time, at that time he wouldn't permit me to send it off in that form and I wrote a different one. (151.) In regard to my impression as to when I met Mr. Post, I thought it was about two weeks after I got here. That is a matter of memory; my impression is that it was later; since yesterday I have looked up those minutes and find they were drawn up, in fact I remember that they were drawn up in Spokane before Mr. Coman came out here. Before Mr. Post came out here, those minutes were not drawn up in the office at Gibbs, they were drawn up in Spokane somewhere because Mr. Post brought them along and I know Mr. Post came out on the morning train, 8:45 or 9:00 o'clock it was at that time, and I see by those minutes that the date is written in already the 18th, I mean dictated in Spokane, and I am inclined to believe more than ever that we had not that meeting on the 18th but those minutes were dictated on the 18th in Spokane and brought out; how much later I could not say, as I said before, so I couldn't say positively.

I had no business dealings with Mr. Kaye in the discounting of the notes or in talking to him. As far as the Spokane people were concerned, the individual that I had the business dealings with was Mr. Coman. At least he was the only person who had the authority in the matter. (152.) With reference to the minute book, on page 20 that you show

me here, all of the parties recited there to be present were present except Mr. Tolerton. (153.) Mr. Coman did not tell me anything about taking possession and notifying the people that I was in possession. I was told to take good care that nobody else would find out about it, this Trustee agreement was to be kept absolutely strictly secret before anybody else; I remember at one time the representative of Dun's or Bradstreet's found it out and one time when I was in Spokane called me up at the Exchange Bank and told me to come over and had a talk with me and I was suspicious of that talk and asked Mr. Coman about it, what I should tell him, and Mr. Coman gave me the advice to say that we do not expect to ask for additional credit and to refuse all information, which I did. (154.) We had several conversations, that is, Mr. Coman and I, of this character. I couldn't remember all, but we had a few conversations about that topic. Mr. Coman, that I am referring to, is the President of the Exchange National Bank of Spokane, the same gentleman who is here.

REDIRECT EXAMINATION.

By Mr. Post:

The first time that I ever saw the letter signed by the Fort Dearborn National Bank, Merrill, Cox & Company and all these other people who signed the Trust Deed in relation to keeping the Trust Deed off the record, the letter addressed to the Mechanics Loan & Trust Company, was when I saw the letter here. I never had a copy of the Trust Agreement or that letter or anything until I came out here. This letter I never saw until I read it just now.

Now in regard to that meeting up there at Gibbs, Idaho, I want to be understood as saying the following: I was very much astonished the other day or when you showed me the book because I was under the impression that it was later, but I wouldn't testify under oath for that is a thing a little too much back. (156.) I never had any correspondence with the Fort Dearborn National Bank. I met Mr. Gibbs in Chicago before I came out here and was introduced to him by Mr. Aaron. I showed all the letters that I wrote to Merrill, Cox & Company to Mr. Coman. I wrote these letters because Mr. Tilden asked me as a favor, if I wouldn't let him know from time to time a little of what was going on. Mr. Tilden, I think, is one of the officers of Merrill, Cox & Company. I do not know whether he is an officer of the Fort Dearborn National Bank or not. (159.) I am not a stockholder of either one of the companies (Stack-Gibbs Lumber Company or Dryad Lumber Company) except to the extent of one share of stock which was put in my name to qualify me as a member of the Board of Directors and I have no financial interest in either of the companies outside of this one share of stock. I have already given you the reason why I wrote the confidential letters to Merrill, Cox & Company—because Mr. Tilden asked me to write these letters, and as I said before I got permission of Mr. Coman or rather Mr. Coman knew about it. I gather from the Trust Deed that Mr. Coman met some representatives of Merrill, Cox & Company in Minneapolis. (161.) I think I am familiar with the signature of Mr. Tilden.

Mr. Post: I will show you a letter marked Exhibit 33 for identification and ask you if that is the signature of Mr. Tilden you refer to as Treasurer of Merrill, Cox & Company?

A. I did not refer to him as Treasurer of Merrill, Cox & Company because I do not know what office he holds but that seems to be his signature.

The Witness: That is the Mr. Tilden I am talking about. I am not familiar with the signature of John Fletcher; I know the signature of Mr. Aaron and the signature attached to Exhibit 34 for identification is Mr. Aaron's signature.

Mr. Post: Now Mr. Katz, in respect to the $15,000 you have been talking about, don't your books show there that those notes were subsequently canceled, as a matter of fact the $15,000 represented by those notes was never used by the Stack-Gibbs Lumber Company?

Mr. Adams: I object to that, the witness can not be led; let the witness tell if he knows anything about it.

The Referee: The objection is overruled.

Mr. Adams: Note an exception.

The Witness: The books show that if that note would not have been in existence there would have been an overdraft in the bank right there, consequently it must have been used, they had a balance in the bank of $8,000, which was undoubtedly on account of that $15,000 note or part of it to the extent of $8,000 and the minute that note was paid, there was an overdraft of $6,000.

Q. I want you to show me that on the books?

A. On February 14th the Exchange National Bank of Spokane showed a balance on hand in favor of the Stack-Gibbs Lumber Company of practically $6,300; see here deposits with Exchange $78,496.04; withdrawals, $72,084.13; the 15th the first entry is $15,000 Exchange Bank, notes $10,000 and $5,000, No. 7366-77, canceled, bills payable $15,000. On the end of that day the Spokane Bank showed an overdraft of about $8,000.

Q. It says there that those two notes were canceled, the Exchange National Bank's notes 7366 and 7367 canceled?

A. That is what it says on the books.

Q. That is not a usual entry in the books when notes were paid is it to mark them canceled?

A. The bills payable it is marked paid.

The Witness: That just depends on the books; I wouldn't say there was any rule about it. The same bookkeeper wrote paid in one book and canceled in the other. I find on February 15th another note was paid, $1,172.04, Powell-Sanders, but it does not use the word canceled or paid, simply says Powell-Sanders note. In bills payable it shows a charge on bills payable, consequently it must have been paid on a note. (146.)

(Whereupon adjournment was taken until January 8th, 1917, at 1:30 P. M.)

On the resumption of Court, Mr. Katz resumed the stand under

REDIRECT EXAMINATION

By Mr. Post:

The Witness: I remember a Mr. Joe Richards, an accountant, going over the books. I can't tell you what he did; I gave him only the trial balance and told him where the books were, and told him I couldn't give him any information. He didn't go over any questions with me. I am showing you the book, entry February 15th. This book has all the records in it for several years up to 1916. (165.) The cash book here shows our deposits in the Exchange National Bank. I do not know when the account was opened but it must be long ago. The first record in this book is January 24th. This entry shows all the transactions between January 1st and 24th.

Mr. Coman: These are not entries, are they? They are balances.

The Witness: The total checks deposited in the Bank during the month, $103,645.92, shows here (indicating on the ledger) it simply was posted at different times at the end of the month, it had to agree, and the same things you had on the checks, withdrawals, $88,573.94 only one entry made at the end of the month of the withdrawals.

Mr. Post: If a note was discounted on a certain date would that show on the books?

A. No, not in the ledger, bills payable don't show in the account of that particular firm because they are charged. Referring to the items of the $10,000.00 note and the $5,000.00 note I find an entry

on the books of date February 16th, 1916, as follows: "$15,000.00 Exchange Bank note 7366 and 7367 $10,000.00 and $5,000.00, respectively; cancelled, bills payable" (167) I am reading now from the check register, sheet 168. The page in the cash receipts book was 200.

Q. It appears in the cash book somewhere on February 15th?

A. No, it should not, the cash receipt book don't show anything but cash receipts; as we made the deposits to the bank the total amount was transferred to the check register here; in the check register you have an account deposit which shows the deposits with the explanation and the explanations are given in the cash receipt book; these explanations you find here are disbursements, drawn against the deposits. It has to appear here and once more under deposits.

Q. On February 15th it appears in some other book?

A. That is something I would like to find myself.

Q. I thought you said it appeared in the notes register?

A. Yes, sir, as being paid. (168.)

The Witness: Bills payable shows next to the notes I mentioned, 7366-67, the word "paid"; the amount $10,000.00 and $5,000.00 are stricken out in red ink and behind each word is the word "Paid" in red ink. It shows the name of the Exchange National Bank of Spokane. There is no page number to this, it is among those notes which were issued at the time, at the end of December and the begin-

ning of January. The date of the note is December 30th, 1915.

Mr. Post: I wish to ask you this in regard to that, the other notes that are marked "paid", state the times that they were paid don't they, under "when due" it is written in red ink the memorandum showing when due, and under the next when paid; the memorandum showing when paid; now as to these two notes—there is nothing under "when due" or "when paid," no entry at all?

A. It shows when they were paid.

Q. Is there?

A. You asked me two questions at one time.

Q. I want you to answer as it appears here you have the words "when due" right in the middle of that page?

A. Yes.

Q. And every other note on that page there is a memorandum under those words "when due"? (169.)

A. Yes, sir, whenever the note—it is a demand note and this is nothing but months.

Q. You are arguing with me. I am trying to find out what the fact is. There is a memorandum everywhere except as to these two notes.

A. That is correct.

Q. Now, when paid there is also in black ink "when paid" and three columns?

A. Yes.

Q. And as to every other note there is a statement made "when paid"?

A. No, there isn't, I see only the statement is here, I notice they wrote under this head the amount of interest.

Mr. Adams: We would like to have all the records go (171) in evidence and copied and be substituted for them if the court pleases.

The Referee: Very well.

Mr. Post: I am offering in evidence these two pages.

Mr. Adams: No objection.

The Referee: They will be admitted.

Whereupon the pages referred to were admitted in evidence and marked petitioner's Exhibits No. 35 and 36 respectively.

The Witness: Now referring to the last page—the last page of my certified copy of the minutes of the stockholders' meeting purporting to be held on February 18, 1916, was written by my stenographer in my office. (172.) The certificate was not dictated by me, it was undoubtedly dictated by Mr. Cleland, who was attending to all these matters at that time. I was the Secretary and Treasurer because I didn't know anything about it. Now referring to the time that Mr. Tolerton signed these minutes, if I remember right, he came out some day with Mr. Gibbs, but I really don't know the date it was but it was (173) quite a little while afterwards. I know he wasn't there the same day and if it was the next day I can't tell you, but I know he wasn't there for a little while anyhow.

RE-CROSS EXAMINATION.

By Mr. Adams:

Q. I wish you would tell the court where it shows and what the entry is of the receipt of the $15,000.00, the discount on the $15,000.00 note, you read the item from the "bills payable" book where it appears in your book?

Q. The first time it appears on December 31st, 1915, on page 200 in the cash receipts book.

Q. Will you read that item, please, entire item, I want to give it now in the order it appears?

A. It reads $10,000.00 "bills payable" No. 7366, general account $10,000.00. $5,000.00 "bills payable" No. 7367, general account $5,000.00, deposit in S, (meaning Spokane) $15,000.00.

Q. Now where does it next appear, the next place referring to that particular item?

A. On February 12th.

Q. Will you look in your "deposit account" please in December and January and see if it shows the receipt of that two deposits under the Exchange National Bank of Spokane?

A. That is right, it shows on December 31st.

Q. Tell the Court what you are looking at, what is the book? (174.)

A. I am looking at the check register that shows, that part of it that shows the deposits.

Q. With what Bank?

A. The Exchange National Bank of Spokane.

Q. Please read that entry into the record?

A. Page 152, the first half of the page under de-

posits, Exchange National Bank of Spokane in the amount of $15,000.00, that is all it shows.

Mr. Adams: May it please the Court so that there may be no misunderstanding, we ask leave to have the entire page copied in the record.

Mr. Post: I have no objection; I would like to have it.

WHEREUPON the page referred to was ordered admitted in evidence and marked Petitioner's Exhibit No. 36½ and admitted.

Mr. Adams: Will you tell the Court what was the balance in the Exchange National Bank to the Stack-Gibbs Lumber Company starting with the first day of January, 1916?

A. The first of January the deposit to the Exchange Bank of Spokane was $28,195.77.

Q. Will you tell us whether or not in making up that item of twenty-eight thousand and some odd dollars, was included in the $15,000.00?

A. Yes, it was included in the $15,000.00.

Q. Now will you turn to the latter part of January, now at the end of January what was the bank balance in the Exchange National Bank of Spokane?

A. $10,074.11. (175.)

Q. Now, starting with the first of February of this same book—I do not mean starting—let us take it down here to February 14th—now on the 14th of February, 1916, what was the state of the account just before that item was charged, what was the total withdrawals and the total deposits?

A. Total deposits, $78,496.04. The total withdrawals, $72,084.13.

Q. So you had a balance of approximately six thousand dollars in the bank?

A. Correct.

Q. When the $15,000.00 was taken out of your bank balance how much did you have left, or what was the condition of it?

A. It was overdrawn about $9,000.00.

Q. How was that overdraft finally made up, how did you pay the bank that overdraft?

A. Well, I guess any money that came in, money through notes and the money through deposits.

Q. Didn't you deposit and discount one of these five thousand dollar notes in this controversy here?

A. Yes.

Q. That went into that account to make up that balance?

A. Undoubtedly. (178.)

Mr. Post: When was that deposited?

A. $10,000.00 on the 19th.

Mr. Adams: On the 19th $10,000.00 was used, then what was the condition of this account with the Exchange when you used $10,000.00 of these notes?

A. Well, we still had $5,000.00 overdrawn.

Q. You were still $5,000.00 to the bad?

A. Yes—we kept drawing checks.

Q. Will you go to page 169 under the date of the 24th and see if you used another $5,000.00 note?

A. The next one we used on the 21st.

The Witness: On the 21st we deposited $5,000.00, the interest—$4,925.00 net, and we were still overdrawn about $6,000.00; and on the 24th we were

still overdrawn on the 24th. We caught up on—no still three hundred missing (177) on the end of the 28th.

There was then offered and received in evidence, pages 152 to 169 inclusive.

Mr. Adams: Mr. Katz, during the period of time that I have just offered the records in evidence was there any other money paid the Exchange Bank other than the $15,000.00?

A. I find on page 153 of the check register under "withdrawals" Exchange National Bank, Spokane, the amount of $10,178.20 on the 5th day of January, Dryad Farms, Dryad Lumber Company, $10,-000.00 charges to the general ledger account, that is all.

Q. For the purpose of the record, will you tell the Court, please, what this is, what Company's record you have been reading from?

A. Stack-Gibbs Lumber Company.

Q And this money you now refer to was money paid out of the Stack-Gibbs Lumber Company account to pay the bond of the Dryad Lumber Company?

A. Yes, sir.

Mr. Adams: We now offer—we have no objection to the whole book—we want to offer between those two dates, December 30, 1915, up to February 29th, 1916, the book that the Stack-Gibbs Lumber Company entitled on the outside "check register transfer and cash book"; and ask leave from Mr. Katz to have duplicate sheets made of these in lieu of the originals and file them in the record?

The Referee: Leave is granted to prepare full, true and correct copies of those exhibits and that they may be filed as substitutes for the originals. (The sheets referred to were admitted in evidence as Exhibit No. 36A.) (179.)

RE-DIRECT EXAMINATION.

By Mr. Post:

Q. Where is that entry about the bond?

The Witness: (Indicates, record before him.)

Q. What date is that?

A. January 8th, 1916.

Q. That was in the month before you came here and you knew nothing about it until what is here in the book?

A. That is all I can testify to.

Q. Except that you do know that the Dryad Lumber Company was an employee of the Stack-Gibbs Lumber Company and they were owing them and paying them money all the time?

A. Who was owing?

Q. The Dryad Lumber Company was paying the Stack-Gibbs Lumber Company or paying—the Stack-Gibbs Lumber Company were paying the Dryad Lumber Company or paying the creditors of the Dryad Lumber Company every few days.

A. We deposited it for the Dryad Lumber Company and they paid it out themselves.

Q. Was this $10,000.00 charged on January 5th to the Dryad Lumber Company?

A. Yes, sir, it was charged to the Dryad Lumber Company. (180.)

RE-CROSS EXAMINATION.

By Mr. Adams:

.... Q. Was the Stack-Gibbs Lumber Company indebted to the Dryad Lumber Company on the 5th day of January, 1916, can you tell us?

A. I know that by memory, but I can show you that the Stack-Gibbs Lumber Company was a creditor of the Dryad.

Q. To what extent?

A. I think $135,000.00.

Mr. Post: If we are going into that, you know that was fudged, don't you?

A. Well, before answering that question, I would like to have a clear definition of that word.

Q. You know that wasn't. The Dryad didn't honestly owe the Stack-Gibbs Lumber Company one hundred thirty thousand odd dollars or anything of the kind.

A. Well, not all of it. I know what you refer to, certain dividends, but they were only $125,000—$126,000.

Q. That is, there was $126,000.00 of this alleged credit that wasn't on the square?

A. I will let somebody else judge that.

Q. You say you know as to $126,000.00 of it that wasn't honest and true?

A. It does not look like it.

Q. So as a matter of fact—I am informed that your Honor already has made a finding that the Dryad didn't owe the Stack-Gibbs—which is a Mechanics lien matter?

Witness: I think that was a personal act by somebody else and that is why I wouldn't dare to testify. (181.)

Q. You have already testified in response to your counsel's—excuse me, Mr. Adams—the gentleman from Chicago—they were a creditor. That is not correct, is it?

A. I am not going to testify to that. I am not competent, inasmuch as it was found already.

Q. The Stack-Gibbs Lumber Company employed the Dryad to do certain work for them that you refer to?

A. That is correct.

Q. And there was a running account where they owed them for this work, and owed them and paid them, and paid them and owed them, and that was going on for some time?

A. I don't think that there was a running account. I don't think the Stack-Gibbs Lumber Company caught up with it.

Q. They never caught up that $126,000?

A. I don't think they are worth anything.

Q. The Dryad, they were closely affiliated corporations; Mr. Gibbs and Mr. Tolerton owned practically all the stock of the Dryad; that is correct, isn't it?

A. Yes, that is correct.

Q. And Mr. Gibbs and Mr. Tolerton owned practically all the stock of the Stack-Gibbs Lumber Company?

A. That is correct, also.

The witness excused. (182.)

E. T. Coman, being called as a witness on behalf of the Petitioner, and being first duly sworn, testified as follows:

TESTIMONY OF E. T. COMAN.
DIRECT EXAMINATION.

By Mr. Post:

My name is E. T. Coman. I live in Spokane and I am President of the Exchange National Bank, having filled that office for six or seven years. I am also a member of the Board of Trustees of the Mechanics Loan & Trust Company and the other members of said Board were Mr. Rea, Mr. William Huntley, C. E. McBroom and O. M. Green. Mr. Huntley is vice-president of the Exchange National Bank, as is also Mr. Green. Mr. McBroom is cashier of the bank and Mr. Huntley is the president of the Mechanics Loan & Trust Company (183) I think Mr. Green is the vice-president of the Mechanics Loan & Trust Company. Some time in the month of January, I went East with C. D. Gibbs of the Stack-Gibbs Lumber Company to meet some of his larger creditors; that was in the latter part of January, 1916. We went to Minneapolis and there met Mr. Carpenter, Mr. E. L. Carpenter, I think it is, there was a Mr. Howard, they called him "Bob," but I think his name was Howard, they always referred to him as "Bob," but if there is any question about his identity he was the man who was very hard of hearing and the confidential man of the Shevlin, Carpenter Company; Mr. Aaron, Mr. Tomlinson, Mr. Hess, Mr. John Fletcher, Mr. Hovey, Clark was not in the conference

but he came in occasionally to advise us about some transaction in which the Shevlin-Clark interests were concerned. Mr. Searle was there and I omitted C. D. Gibbs. Now there were bookkeepers and stenographers came in and out. The meeting was held at the office of Mr. Carpenter. (184.) Mr. Carpenter represents the Shevlin-Carpenter Lumber Company and he is a trustee of the Shevlin Estate and officer of the Idaho Timber Company and the Shoshone Lumber Company and a director of the Security Bank. We were in Minneapolis for two or three days. Mr. Howard was connected with the same people that Mr. Carpenter was and Mr. Aaron is the attorney for Merrill, Cox & Company of Chicago and the Fort Dearborn National Bank of Chicago. Mr. Tomlinson was connected with Merrill, Cox & Company and Mr. Fletcher is the vice-president of the Fort Dearborn National Bank. The subject that was under consideration was the refinancing and the extension of the obligations due the Stack-Gibbs Lumber Company to their various creditors with a view of getting them in a condition to continue their operation. I was asked to go down to Minneapolis by Mr. Gibbs. The Stack-Gibbs Lumber Company did business with our bank. (185.) Our bank was also the owner of the bonds of the Dryad Lumber Company. Before we went East, there was a Trust Deed prepared in Spokane by Mr. Post, but that is not the Trust Deed that was finally signed. The Trust Deed that is in evidence here, Exhibit 14, was prepared by Mr. H. J. Aaron. As I recall, there were five copies of it made or had in Minneapolis.

The Trust Agreement was signed on the day indicated in the instrument, February 1st, 1916, at Minneapolis. It was executed by Merrill, Cox—we were all sitting around the table something like that and these whose names I give you signed right then, Merrill, Cox & Company by H. J. Aaron (186). It was done in the presence of Mr. Tomlinson of Merrill, Cox & Company, but I wouldn't be positive about that because Mr. Tomlinson left after we had come to an agreement and went back to Chicago, I think ahead of the others. The Fort Dearborn National Bank was signed by H. J. Aaron right there and Mr. Fletcher of the bank was there when Mr. Aaron signed; he is the vice-president of the bank. Mr. Fletcher did not sign, but told Mr. Aaron to sign and I heard him. It was in my presence. Mr. Searle was there and signed. The First National Bank of Lincoln had no one representing them but Mr. Searle, he signed to that as it appears there; I signed for the Exchange National Bank, the Shoshone Lumber Company was signed by Mr. Carpenter and the Idaho Timber Company was signed by Mr. Carpenter; F. H. Hess signed that himself. The signatures of J. K. Stack and Genevieve Hess Tolerton and Mrs. M. A. Gibbs were obtained subsequent to that time. (187.) There was considerable discussion as to the way of putting up $100,000.00 or that part of it that might be used as is referred in the Trust Deed. The greater part of the discussion was before the signing of the contract, if there was any after, I do not recall it. We discussed it all the time we were there, but as to which day it was talked about or

which hour I couldn't say. (188.) The capitalization of the Mechanics Loan & Trust Company in January and February, 1916, was $10,000.00. (189.) While I was in Minneapolis, I wrote a letter to J. K. Stack and sent him this agreement that had been signed by the other gentlemen and I kept a duplicate of that letter.

Mr. Post: I offer petitioners' Exhibit No. 37 in evidence.

(And it was admitted without objection.) This letter dated February 2, 1916, states that Mr. Coman is enclosing five copies of the trust deed in question, signed by various creditors, together with two letters signed by the creditors, addressed to Mechanics Loan & Trust Company, and "if these documents meet with your approval, will you kindly execute the same for the amount owing you, which from the books appears to be $110,000. Upon the completion of the documents, kindly forward to me by registered mail, care Exchange National Bank, Spokane;" also, "this arrangement has been a result of a conference of the different creditors of Mr. Gibbs, concerns representing more than ninety per cent. of the indebtedness. It seems to all concerned to be the best plan to conserve the assets of the concerns and at the same time protect the interests of the creditors." There is attached a postscript saying that it appears that the representatives of one of the creditors, a Chicago party, did not come with proper authority to sign, and therefore that the documents be sent to H. J. Aaron, Fort Dearborn National Bank Building, 76 Monroe street, Chicago."

The Witness: I received a letter from Mr. Stack, which I now hand you. (193.)

Whereupon Mr. Post introduced the letter, marked Exhibit No. 38, in evidence. This letter from Mr. Stack to Mr. Coman acknowledges receipt of the five copies of the trust deed and two letters, and states that he has signed same and forwarded to Mr. Aaron. Witness produces a duplicate of one of these letters and states that the same was signed by the creditors there present in Minneapolis, and the same was offered and received in evidence and marked Exhibit No. 39. Said letter is dated February 1, 1916, is addressed to Mechanics Loan & Trust Company, and states: "We, the undersigned creditors of Stack-Gibbs Lumber Company, have executed as creditors the deed of trust to you given by said company, and request that while you shall take possession at once of the property described therein and perform all your duties under the trust deed, you shall not at this time place said deed of trust of record until you shall believe, under the advice of counsel, that it is necessary so to do, in order to protect our rights in the premises, especially as against other creditors. We understand, of course, that if this deed of trust is not put of record, it will be possible for the lumber company to make some conveyances of property, but we have not the slightest fear of anything of that kind being done, and feel that it is for the best interests of the creditors, as well as the lumber company, that as little notoriety as possible be given to this trust, and

for that reason suggest that you do not place said instrument of record until you feel that the same is imperative." The letter is signed "Merrill, Cox & Company, by H. J. Aaron, its attorney; Fort Dearborn National Bank, by H. J. Aaron, its attorney; I. F. Searle; First National Bank of Lincoln, Nebraska, by I. F. Searle; The Exchange National Bank of Spokane, by Edwin T. Coman, President; Shoshone Lumber Company, E. L. Carpenter, President; Idaho Timber Company, E. L. Carpenter, Treasurer; S. H. Hess; J. K. Stack; Genevieve Hess Tolerton; Mrs. M. A. Gibbs."

Mr. Post: I offer in evidence petitioner's Exhibit No. 39.

There being no objection the letter was received in evidence. (194.)

The Witness: The reference in this letter to Mr. Stack, Exhibit 38, to the arrangement being the result of a conference of the different creditors, representing 90% of the indebtedness, was based upon a statement of the assets and liabilities as submitted by Mr. Gibbs at Minneapolis and a copy of that statement was furnished not only to us but to all the other creditors there and the way we figured it out was that when it was signed by Mrs. Tolerton that that completed the necessary signatures. That is, to make up 90%, but in that connection, the secured creditors were not submitted.

Mr. Adams: I move to strike that out as a voluntary statement without any question.

The Referee: It may be stricken.

Mr. Post: I now offer in evidence, two telegrams, marked Petitioner's Exhibits No. 40 and 41.

There being no objection, the same were received. Exhibit No. 40 is a telegram from Mr. Coman to Mr. Stack, dated February 27, 1916, saying: "Please advise by prompt wire if you have received my letter of second with enclosures. Before trustee can act and make advances provided for under agreement, necessary that the signature of yourself and one other creditor be added. Some matters are pressing and prompt action necessary."

Exhibit No. 41 is a telegram from Mr. Stack to Mr. Coman, dated February 8th, saying: "Papers signed fifth and forwarded to Mr. Aaron, Chicago, same date, registered mail."

The Witness: Matters were pressing and some contracts were necessary. (195.) Creditors were pressing for payment of claims, labor was unpaid, loggers were demanding settlement for their accounts and it seemed as though there was danger of the company being forced into the hands of a receiver; in fact there were rumors that application for a receiver might be made. On February 5th I received a telegram from Mr. Aaron in relation to this matter and I got another one on the 7th and another one on the 9th.

Mr. Post: I offer in evidence these three telegrams, marked Petitioner's Exhibits 42, 43 and 44, which were admitted without objection.

Exhibit No. 42 is a telegram from H. J. Aaron to Mr. Coman, dated February 5, 1916, saying:

"Contracts not yet returned by Stack. Can you hurry him?"

Exhibit No. 43 is a telegram from Mr. Aaron to Mr. Coman, dated February 7th, saying: "Contracts received. Now awaiting Mr. Tolerton's signature. Will wire when secured."

Exhibit No. 44 is a telegram from Mr. Aaron to Mr. Coman, dated February 9th, saying: "Contracts signed by Mrs. Tolerton yesterday. Mailing this morning."

The Witness: On the 8th, I wrote a letter to Mr. Stack after getting these telegrams and also a letter to Mr. Aaron and the ones I hand you are duplicate copies of those two letters. (196.)

Mr. Post: I offer these two letters in evidence.

Mr. Adams: How are those letters signed? Exchange Bank, by you as president or simply your individual signature?

A. Well, just my individual signature over that name "president" which my stenographer puts in on all my letters.

Mr. Adams: Did she put in Exchange Bank above where you sign? (195.)

A. No.

The letters referred to were admitted in evidence, marked Petitioner's Exhibit No. 45 and No. 46 respectively. Exhibit No. 45 is a letter from Mr. Coman to Mr. Stack, dated February 9th, saying: "I have your letter of the 5th and note contents. I wired you on the 7th with reference to this agreement. The necessity for urgent action is due to the need of proper authority on the part of the trus-

tee to put up the money urgently needed for the current payroll and to take care of some of the smaller creditors. I have received a wire from Chicago that Mrs. Tolerton has signed, and that finishes the execution of the agreement. It is immaterial whether any of the small creditors here sign or not, as it is the intention of the trustee to pay off any who show a disposition to make trouble."

Exhibit No. 46 is a letter from Mr. Coman to Mr. Aaron, dated February 9th, stating: "I am in receipt of a telegram under date of the 9th, advising that Mrs. Tolerton has signed the contracts. The trustee will go ahead and make the advances to take care of the payrolls due, in anticipation of the arrival of the contracts."

Mr. Post: (To Mr. Adams) I wish you would have your Chicago office, Merrill, Cox & Company, and the Fort Dearborn National Bank send out all the correspondence with Mr. Coman, Exchange National Bank, Mechanics Loan & Trust Company, Mr. Katz and the Stack-Gibbs Lumber Company from December 31st on to June 1st, January 1st to June 1st, 1916.

Mr. Adams: No objection at all, sir.

Mr. Post: Now, Mr. Coman, I see in this letter you state that it will be necessary to make some advances in anticipation of the arrival of the contract; tell the court whether or not Mr. Gibbs in Minneapolis orally concurred and agreed to that contract?

Mr. Adams: I object to that.

The Referee: On what ground?

Mr. Adams: Mr. Gibbs couldn't orally agree to a contract of this character, could he?

Mr. Post: He couldn't find a corporation to do it of course. (198)

Mr. Adams: It is up to the contract to be executed in due form as the contract provides.

Mr. Post: I do not contend it binds the corporation but it shows the attitude not only of Mr. Coman but also of Mr. Aaron and the other gentlemen who were in relation to it.

The Referee: The objection overruled, the answer may be taken for what it appears to be legally worth.

A. Yes, that is what he went down there for.

Mr. Post: In response to this letter to Mr. Aaron, where you say some advances would be made in anticipation of the arrival of the contract, did Mr. Aaron object to that by telegram or by letter?

A. No, sir.

Q. You got a letter from him in answer to that, did you not, and isn't that the letter?

A. Yes, sir.

Mr. Post: I offer this letter in evidence.

(Which was admitted in evidence as Petitioner's Exhibit No. 47.) This is a letter from Mr. Aaron to Mr. Coman, dated February 15th, acknowledging receipt of Mr. Coman's letter of the 9th inst., and saying: "You undoubtedly have my letter by this time enclosing executed contracts and advising you that Mr. Katz was going to leave Chicago on the 13th. He left Sunday night and will call on you on his arrival Wednesday morning."

The Witness: Mr. Aaron suggested Mr. Katz as the man to come out here and run the business. (199) He said by reason of their large interests here, they were entitled to have their man on the job to watch it and report to them and he knew that this man, he was a very able, capable man, familiar with the lumber business and he was particularly fitted for the financial end, which was the part that needed looking after. I do not remember anybody else at the meeting saying he was acquainted with Mr. Katz except Mr. Aaron. Mr. Katz was of course a stranger to me. Before the letter dated February 9th, I received a letter from Mr. Aaron.

Mr. Post: I offer this letter in evidence. (The letter was marked Exhibit No. 34 and received.) This is a letter from Mr. Aaron to Mr. Coman on the letterhead, Law Offices, Henry J. Aaron and Charles Aaron, 76 West Monroe street, Chicago, dated February 9th, stating that he enclosed five copies of trust agreement and two copies of letter signed by all the creditors, and that Mrs. Tolerton had signed both of such documents, and then states: "Will you please see to it that the schedule containing the description of the property of the Dryad Lumber Company is attached to each of the contracts? Also please see to it that the descriptions contained in the contracts are carefully checked, and when the corrections are made, will you please see to it that I get one of the original copies, and also send a copy of the schedule of the Dryad Lumber Company property to Mr. Wetmore at Minneapolis? Will you please also see to it that the meet-

ings of the stockholders of the Stack-Gibbs Lumber Company and the Dryad Lumber Company are held and Mr. Sigmund Katz is elected a director and secretary and treasurer of each of said companies? Will you also see to it that you get as trustee a transfer of the rights of the railroad company, which is a subsidiary company only, to the right of way and equipment? I do not now think of any other steps that you ought to take to protect your powers, but if you should think of any, please see to it that you get everything that you ought to have. Mr. Katz is leaving here Sunday for Spokane and will report to you the moment he arrives in your city."

The Witness: This letter refers to a Mr. Wetmore of Minneapolis, who was present at the conference. He was the man I think they called "Bob," he was the Carpenter-Shevlin man and they always referred to him as "Bob." (200)

Mr. Coman: When Mr. Katz arrived here, he presented me with a letter that I have in my hand, which is a first acquaintance I had with him.

Mr. Post: I offer this letter in evidence. (The letter marked Petitioner's Exhibit No. 48 was admitted.) This letter is on the letterhead of the Fort Dearborn National Bank, Chicago, signed by John Fletcher, vice-president, to Mr. Coman, and says: "This letter will introduce the bearer, Mr. S. Katz, who will call upon you within a few days to take up his duties in connection with the Stack-Gibbs Lumber Company. We have asked Mr. Katz to report direct to you, under the understanding that he will

be made an officer and director of the two companies, as arranged in the agreement."

Mr. Coman: After I returned to Spokane, I showed you (Mr. Post) the Trust Deed and you made some objections to paragraph twenty and the cause thereof were some letters to different parties, creditors and others.

Mr. Post: I wish to offer one of these in evidence with the statement who signed the rest of them.

"The letter referred to was admitted in evidence and marked Petitioner's Exhibit No. 49, admitted, and was read by Mr. Post. This is a letter dated February 19, 1916, addressed to each of the parties who signed the trust agreement signed by Mechanics Loan & Trust Company, pointing out the ambiguity in paragraph 20 of the trust deed, and what was the real intent thereof, and asking for a confirmation thereof.

Mr. Post: This exhibit has signed to it, the name of Genevieve Tolerton—the other letters I have here, I will state they are in duplicate, the first one under the above letter conforms to our understanding the names of the Stack-Gibbs Lumber Company by C. D. Gibbs, Exchange National Bank, Spokane, E. T. Coman, President. Dryad Lumber Company by S. Katz and by H. F. Cleland, Vice-President; (204) the next one signed by C. D. Gibbs, the next one signed Merrill, Cox & Company by Averill Tilden, Treasurer, the next is signed Fort Dearborn National Bank by John Fletcher, Vice-President, next one is signed by I. F. Searle, the next one signed by Shoshone Lumber Company, E. L. Carpenter, Pres-

ident, the next one Idaho Timber Company, E. L. Carpenter, Treasurer, the next one signed S. H. Hess, the next one signed J. K. Stack. (205)

The Witness: As soon as the Mechanics Loan & Trust Company received a telegram from Mr. Aaron they commenced advancing money. I refer to the telegram saying that the document was completed, the Trust Agreement, nor did we stop because of the ambiguity here set forth in the letter. I had not doubt about the creditors and everybody agreeing to it because that was in accordance with our understanding. Now in regard to what the Mechanics Loan & Trust Company did, about taking possession of the property up there at Gibbs, the property of the Stack-Gibbs Lumber Company, Mr. Katz came into the office, and he was introduced to different ones. I do not think he was introduced to you (referring to Mr. Post) until the second day after he arrived, (206), if I remember right, and you prepared the papers that were necessary to carry out the Trust Agreement and left the bank to go with Mr. Katz to put him in charge. Mr. Katz and I had quite a conversation about the matter of his being in charge and in which he should handle the business under the Trust Agreement, explained our views of the situation and told him it was necessary to handle it diplomatically until he had gotten in possession of all the facts; told him Mr. Gibbs was recognized as an able lumber salesman, but was not a good financier, and he was particular to look after the office part of the business, watch the receipts and disbursements and to master the de-

tails of the business as rapidly as he could, that it would require some diplomacy on his part to go in there under the circumstances, and get along with Mr. Gibbs so that everything would work smoothly. Mr. Katz left his signature there at the bank on the instructions that all checks in the future should be countersigned by Mr. S. Katz. (207) In regard to the $15,000 note referred to by Mr. Katz in his testimony dated December 31st, 1915, and marked on the book here as canceled or paid on February 14th, 1916, Mr. Gibbs was negotiating a loan based on some collateral that was to come from a lumber concern in Denver; the collateral never came and the arrangement was never perfected, and Mr. Gibbs was to have credited—I have got here a copy of the Stack-Gibbs Lumber Company account. The paper that I have in my hand is a copy of the Stack-Gibbs ledger account. It is a duplicate; we keep one copy and we send them one just like it, they are made at the same time and are made from day to day.

Mr. Coman: (Reading) There is the account of the Stack-Gibbs Lumber Company from January 1st, 1916, and you will notice that all during that month, there was no credit of such an amount. That item of $15,000.00 was never put to the credit of the Stack-Gibbs Lumber Company. (208) The books of the Exchange National Bank and the books of the Stack-Gibbs Lumber Company would never agree, so you couldn't produce anything; they make an entry here when they send us a remittance, and we do not give them credit until a day or two afterwards, whenever the remittance comes in, and if it

is a Saturday or Sunday or a holiday like January 1st, it would mean they wouldn't get credit for a couple of days afterwards. They wouldn't correspond as to amount (209) unless they put a bookkeeper on and reconciled them. On January 1st, 1916, they had a balance of $202.25.

Mr. Post: I would like to know, Mr. Katz, what was the balance there on your books?

Mr. Katz: $28,195.77.

Mr. Post: That includes the $15,000 item?

Mr. Katz: Certainly, yes.

Mr. Coman: That $15,000 item is not in our books at all, but I have some other books here that will show something about it. This only shows in a negative way that no such transaction took place between the Stack-Gibbs Lumber Company and the Exchange National Bank. This is a complete record of every loan made (210) between the 31st day of December and the 15th day of February,and it contains loans made to everybody else and if you gentlemen will agree on someone whom you will trust, I will prove it to them, but I do not care to have this go into the record for public inspection. The note register that I have here is for every one, not the Stack-Gibbs Lumber Company alone, but there was no such transaction took place between those dates. Mr. Gibbs brought in this $15,000 note and promised to turn over some collaterals. There was an acceptance or an order on some firm in Denver, but it was never accepted by the Denver firm, as the collateral was never completed and we never gave him that credit. (211) In the Trust Deed the

Exchange National Bank signed for $6,000 as their indebtedness. This matter that was in the air was discussed there. This $15,000 they knew that we were not a claimant for that amount. We didn't have any such canceled notes as the loan was not made, the note would be turned over to Mr. Gibbs or somebody connected with the company, these are just copies of those you have now.

Q. I understand from Mr. Katz that he can't find any such papers, so I judge you turned it over to Mr. Gibbs and he tore them up or something of that kind; I will ask Mr. Katz now—any checks written to pay either one of these notes—there would have to be in order to pay the notes.

Mr. Katz: It is mentioned here as a bank memorandum.

Q. You make checks to pay notes, don't you?

Mr. Katz: It isn't always necessary.

Q. Ordinarily—

Mr. Katz: Oh, we might get a charge account from the bank and enter it on our books. (212)

Q. But when the Stack-Gibbs Lumber Company according to this system of bookkeeping paid off a note held by somebody they gave a check for the balance.

Mr. Katz: I can show you quite a few cases where that didn't happen.

Q. That was the custom, that was the rule?

Mr. Katz: It is the rule nine out of ten cases, but there is the tenth case where it does not happen.

Q. There wasn't any check given for these two notes, were there?

Mr. Katz: No.

The Referee: Was it the almost universal custom of the Stack-Gibbs Lumber Company to make these payments by check, or was it commonly the occurrence they were not paid by check but paid some other way?

Mr. Katz: It was the custom of some to pay by check and some it wasn't; I remember Merrill, Cox & Company for a month or two after I came I gave up that custom and simply reduced notes—Oh, that was renewal notes.

Q. Merrill, Cox & Company, all you did after you came here was to make renewal notes, but you would give them a check for the interest, is that what you did?

Mr. Katz: Yes, sir, that is what I wanted to say —the custom is usually to pay by check.

Mr. Adams: We would like to have his customers' ledger, daily bank balance—and the other matters I asked him to produce before taking up the cross examination. (213)

(No response seems to have been made to this suggestion.)

CROSS-EXAMINATION

By Mr. Adams: (214)

The Witness:

We keep a record every day showing our gross receipts and our gross bills receivable and we keep a customers' ledger and our tellers have a scratch book where they make all kinds of entries and these yellow sheets are a record of the customers' ac-

counts in the bank. We do not have any other customer account except this. The book that I have in my hand is the record of all the loans made by the bank. We keep a separate ledger account with our customers (214) and we kept a ledger account with the Mechanics Loan & Trust Company on our ledger.

Mr. Adams: Then what I would like to have on the 5th of February would be the daily balance books you would keep the record in the bank?

Mr. Post: During what time?

Mr. Adams: From the 15th of December up to the 15th of May, his customer's ledger?

Mr. Coman: I can't see how that can serve any purpose; I will show it to you down in Spokane, and let you see whether it can serve your purpose; it is very bulky volume.

Mr. Adams: Just small statements?

A. It is a book about that square (indicating).

Q. You mean your customers' ledger, or daily balance book?

A. Daily balance book, that contains the entry of every bank account, balances due banks and from banks and—

Q. Suppose you made an interest charge against one of your customers for an overdraft or for a note where will that show?

A. That would show on that sheet you have there. (215)

Q. How would you find it on here, how could you tell from this document what it was for; how would you tell what is interest and what is for something else?

A. You see I couldn't tell now, but the customer could tell because he has every item that goes in there; this sheet is taken out and sent each month to the customer and the vouchers representing these charges are enclosed with the letter; I could tell what made up these items of deposit because we have the deposit slips in our files, of which the customer has a duplicate.

Q. We can get up a list of the items we want and send it to you a week or ten days in advance; that would be time enough?

A. Yes, sir.

Mr. Adams: (Reading from the book) Under December 30, State 233 under the column "Dates," is, "Stack-Gibbs Lumber Company numbers 5 and 6, $5,000, $10,000, 8/8, C. G. Gibbs," I would like to know when those were paid?

A. ———— (The witness does not answer.) We carry a separate account with Mr. Gibbs; I do not see any entry that I have checked up to the 24th of February.

Mr. Adams: Will you look at your general bank balance and see if you didn't include that in your bills receivable after that?

A. Yes, sir, I will.

Q. Then look at C. D. Gibbs' personal account and see if there is any chance you carried it over into it.

A. Yes, sir.

Mr. Adams: I would like to offer at the proper time and if Mr. Coman will please have that portion of the line copied, all the rest blank. (217)

Mr. Coman: All right.

Mr. Post: What is that book?

A. Bills receivable journal.

Q. Of the Exchange National Bank in Spokane?

A. Yes, sir. (218)

The witness excused.

Whereupon an adjournment was taken until January 16th, 1917.

On January 16th, 1917, no proceedings were had in relation to the matter of either the Mechanics Loan & Trust Company or the Exchange National Bank, and a further adjournment was taken until January 19th.

Mr. Post: We desire to file a petition of the Exchange National Bank which has relation to the claim of the Mechanics Loan & Trust Company; that is, this petition sets forth the interest of the Exchange National Bank and it is that the claim of the Mechanics Loan & Trust Company be allowed in the name of the Mechanics Loan & Trust Company. I wish to file this as a petition and also to eliminate any question as to the name of the party who is entitled to have the claim allowed in its name or otherwise. This was objected to by the objecting creditors. The objection to its being filed, however, was overruled and it was permitted to stay on file. Thereafter the following proceedings were had.

E. T. Coman, a witness recalled on behalf of the petitioner, testified as follows:

TESTIMONY OF E. T. COMAN.

Direct Examination.

My Mr. Post:

Since my former testimony and upon returning to Spokane, I got hold of the records of the bank in respect to the two notes, one for $10,000 and one for $5,000, that we were discussing and these records I have shown to Mr. Adams, Mr. Canfield and Mr. Danson. I think it was the day after we left here. I have brought all these records up here in respect to those two notes, which I now produce. (266) I am now referring to line 16 on page 233, Bills Receivable J; there appears bills receivable 27,075, representing a loan of $5,000 in the name of C. D. Gibbs, line 17 is 27,076 and represents a loan of $10,000 to C. D. Gibbs.

Q. In whose name?

A. C. D. Gibbs, and on 16 appears the endorsement Stack-Gibbs Lumber Company. It also appears on page 261 under date of January 25, 1916, line 25, the following entry representing a payment of notes, C. D. Gibbs, $5,000 No. 27,075, which is the number of the Bills Receivable, the entry in the margin paid by C. D., No. 82495; on the same date on page 262 on line 2 appears the entry loan paid $10,000, C. D. Gibbs No. 27076. That is on January 25, 1916, and is before I went to Minneapolis. (267) Now here is the original certificate of deposit No. 82495, it is endorsed on the back, "used to pay B. R. No. 27075 of C. D. Gibbs, January 25, 1916." That certificate of deposit was never delivered to C. D. Gibbs or the Stack-Gibbs Lumber

Company and it was issued December 30, 1915. What the Certificate of Deposit had to do with this note for $5,000 is this—the note was to have been secured by some sort of acceptance or security from some lumber company in Denver and pending the receipt of that security the cashier's check was issued or the C. D. covered the amount of money and the security never came so the money was never delivered. The C. D. I have referred to was not paid for with some other consideration except this five thousand dollar note.

Q. You were to have security for it issued C. D., waiting for the security, and the security didn't come and you cancelled the note and the C. D.; that is the straight of it, is it?

A. Yes, sir, by closing the entry on the books.

Q. So the Stack-Gibbs Lumber Company never got any credit so far as your books are concerned and never used that Five Thousand Dollar note?

A. Not so far as this $5,000 is concerned.

The Ten Thousand Dollar note was used as a balance note and it was credited on the books of the bank in Stack-Gibbs Lumber Company account No. 2 of which I have the duplicate sheet showing on December 30, 1915, a credit of $10,000 and on January 25, 1916, a payment of $10,000 which also represents a closing entry on the books cancelling the other Ten Thousand Dollar note. I am reading from a duplicate of the ledger sheet—we make two copies, one we furnish to the customer and the other is kept in the bank and the one I am reading from is the one that I have kept in the bank and the other

was sent to the Stack-Gibbs Lumber Company That was what we call the balance account, account No. 2 on the ledger; no checks or drafts could be drawn on that account except countersigned by me; that was for a special purpose. (260)

They never used the money, they had no right to use it and it was never drawn from the bank. As to where the notes are, I made a search in our office for the notes and could not find them, but I found a letter, a copy of a letter saying we had transmitted the notes to the company and this letter, I now produce.

Mr. Post: I would like to offer these letters in evidence but have them read into the record as it is short and much easier to keep them that way.

Mr. Adams: I have no objection.

Mr. Post: I will read them into the record. The first letter is with the heading of the Stack-Gibbs Lumber Company, Gibbs, Idaho, February 12, 1916. Exchange National Bank, Spokane, Washington, Gentlemen: We are enclosing herewith our check No. 2774 for $153.33 interest for forty days on the 14th on Ten Thousand Dollars and Five Thousand Dollars, demand notes, dated 12/30/15. If this meets with your approval kindly cancel the notes and return same to us. Yours truly, Stack-Gibbs Lumber Company, Cleland.

The other is, February 14, 1916, Stack-Gibbs Lumber Company, Gibbs, Idaho, Gentlemen: I acknowledge receipt of your letter of the 12th enclosing check for $153.33 interest on demand notes which are cancelled and returned herewith. Yours very

truly, E. T. Coman, President. The only thing else in respect to these two notes that has not been brought out is that it has been the custom of the Stack-Gibbs Lumber Company to give a note or notes which it was not intended to be used by the company, as a balance note so that the account would have a balance in it. It is usual when the bank is making loans to base credits upon the average balance and the business of the customer; with the Stack-Gibbs Lumber Company it was very difficult for them to maintain a balance there was two or three parties drawing on the account and each one would claim that some other member of the firm drew the money therefore the agreement with reference to the balance (271) had not been kept, in order to obviate that we would place the money that was agreed upon that should be kept as an average balance in a separate account and keep it where it couldn't be drawn against; sometimes we had the note of Mr. Gibbs and sometimes one of Mr. Tolerton and sometimes we had the note of Mr. Cleland. The balance account then was for the purpose of keeping the account of the Stack-Gibbs Lumber Company in good standing on the books of the bank for the purpose of maintaining a substantial balance there.

These two notes, one for Ten Thousand Dollars and one for Fve Thousand Dollars were cancelled before I went to Minneapolis to attend the creditors' meeting.

This petition of the Exchange National Bank that

we have been heretofore talking about is signed and sworn to by me as president of the bank.

Mr. Post: I offer in evidence upon this hearing, the petition of the Exchange National Bank which was filed this day marked Petitioner's Exhibit No. 50.

Mr. Adams: I object to it as incompetent and immaterial. They can't make evidence by filing a petition and offering it in evidence.

The Referee: The objection will be overruled.

Mr. Adams: Exception.

Whereupon the petition referred to was admitted in evidence as Petitioner's exhibit No. 50 and admitted.

Q. Now Mr. Coman when you were in Minneapolis when this Trust Deed was in process of preparation, did you have any conversation with any of the people who subsequently signed the Trust Deed as to where the money would come from that might be loaned by the Mechanics Loan & Trust Company (274) to the Stack-Gibbs Lumber Company under the terms of the Trust Deed; that can be answered yes or no?

A. Yes.

Q. With whom did you have a conversation on that subject?

A. Probably six or eight or ten people and the conversation was around the board and all of those present.

Q. And the names you gave us the other day, I think, I am not sure?

A. Yes, sir.

Q. Mr. Aaron and—

A. Mr. Fletcher, Mr. Tomlinson, Mr. Hess, Mr. Carpenter.

Q. Well what if anything did you say to those gentlemen there as to where the money, if this trust deed was signed, where the money would come from that would be advanced by the Mechanics Loan & Trust Company under the terms of the Trust Deed?

Mr. Adams: We want to object. That question came up before and your Honor passed upon it and I assume now they are offering this testimony or attempting to offer it under that clause of the present petition which says that at the instance or the request of the signers of the Trust Deed the Exchange Bank did certain things; we want to object on the ground that it is incompetent and immaterial as it is a contemporaneous oral agreement set out in the petition and it is incompetent and immaterial and no evidence as to the authority of anybody there to make any such statement as is here now attempted to be proved.

Mr. Post: It is of course, what I am offering to show is in no way inconsistent with the Trust Deed; it is simply—and so far as the authority of the gentlemen there is concerned I do not think counsel will seriously argue that objection.

Mr. Adams: I certainly insist and strenuously insist upon every objection which I make.

The Referee: The proceedings are drifting in the direction I anticipated they would drift with reference to the allegations set forth in this petition of the Exchange National Bank as over and against

the terms of the Trust Deed upon which the claim of the Mechanics Loan & Trust Company is based; I am not disposed to permit any oral testimony to vary or attempt to vary the terms of the Trust Agreement, but it must be manifest to counsel that it will be very difficult to discriminate in view of this attempted offer of testimony under the allegations of the petition of the Exchange National Bank.

Mr. Adams: The petition of the Mechanics Loan & Trust Company sets forth their claim; the petition which your Honor overruled the motion to strike sets forth the purpose that there should be no misunderstanding as to who was filing the claim, namely the Mechanics Loan & Trust Company; I am assuming this question shows some interst of the Exchange National Bank in the proceeding.

Th Referee: Let me ask this question in order that the Court may understand the situation—does the Trust Deed or the Trust Agreement have any reference whatsoever as to where this money is to come from, the sources of it?

Mr. Adams: It provides the Mechanics Loan & Trust Company can advance, if they desire, up to One Hundred Thousand Dollars, and they have a lien up to what they advance, and they allege they advanced in pursuance of the terms of that contract; they now allege in this amended petition that the Exchange National Bank joined in certain advances by reason of certain oral conversations which took place.

Mr. Post: You misinterpret the petition—not intentionally of course, but you are unable to ap-

preciate it or put language into it that is not intended.

The Referee: I do not wish to intimate that what I have said has any reference to any allegations that may be found in the claim, amended claim or petition of the Mechanics Loan & Trust Company because it would be necessary to determine undoubtedly under the pleadings when this answer is filed who is the real party in interest in this case. The Court might be forced to hold under the evidence that the Exchange National Bank was the real party in interest and that the Mechanics Loan & Trust Company was the agent of that bank in preparation and submission of its proof of claim. It is not clear that this question touches any matters set up in this Trust Agreement I am speaking of here.

Mr. Post: It does not tend to vary it in any way.

The Referee: I ask again whether this particular Trust Deed referred to in the question specifies with reference to the sources of money? (277)

Mr. Adams: Yes, your Honor.

Mr. Post: It does not.

Mr. Adams: I take issue with Mr. Post. The Trust Deed provides that the Mechanics Loan & Trust Company can advance—the word Trustee refers to the Mechanics Loan & Trust Company, "The Trustee shall advance such sum of money as it shall be necessary to—" (Here Mr. Adams read an extract from the petition.)

Mr. Post: I am not trying to prove that somebody else should advance it, but I assume when it says the trustee shall advance such moneys as may

be necessary to meet the payroll, etc., it doesn't mean that the trustee has got to get it out of its own pocket; that is a matter of no concern to the other people; it has a right to borrow it or get it from somebody else if it wants to. I assume if they did get it from somebody else, it couldn't make any difference. I am inclined to agree with something Mr. Adams said today here a little while ago, that it wouldn't make any difference where the trust company got the money if it still had the claim, but the trouble with that is that sometimes he says that and sometimes his associates say something else.

Mr. Adams: (Continuing) The Exchange National Bank have a right to have a claim for any amount they advanced, but having a lien or as a subrogation is an entirely different proposition. (279)

Mr. Post: Then, as I understand the gentleman, the point is this: We have a right to get the money from some other place and therefore would have the right if we got the money from some other place to be a general creditor, but couldn't have a lien or be a preferred creditor unless we got the money out of our own clothes. Of course, that may go some places, but we might as well take these things humorously. This has got to be a comedy. I want just to get all the facts here, if your honor please, and it has got to be passed on not only by your honor but by Judge Dietrich, this whole story. Somebody will take it there, so let us get the facts and whatever happens, if we get them in, we will stand

by. We are not trying to cover up anything, but to get it out of our system and tell the whole story.

The Referee: The Trust Deed appears to place the burden of securing these funds upon the Trustee, the Mechanics Loan & Trust Company; I think I shall sustain the objection at this stage of the proceedings; I take it it will be necessary to go into these matters in connection with the issues raised by the answer to be filed to the petition of the Exchange National Bank, and I shall sustain the objection for the present.

Mr. Post: Exception and in order to make the record, I wish to make an offer of proof. That is that Mr. Coman at this meeting at Minneapolis said to these various gentlemen there that the Mechanics Loan & Trust Company had a small capitalization and very little money on deposit and would be unable to take out of its own vaults and advance One Hundred Thousand Dollars or anywhere near that sum and that the Mechanics Loan & Trust Company would therefore have to get this money from the Exchange National Bank and the Exchange Bank would let the Mechanics have it to loan under this Trust Deed or to advance under this Trust Deed and they said they understood that and that was expected and they could go on and act accordingly. (280)

Mr. Adams: To the offer we object if the Court pleases.

The Referee: Sustained.

Mr. Post: Exception.

CROSS-EXAMINATION.

By Mr. Adams:

The object of a balance account in a bank—it is usual when a bank makes advances that the loan be based upon the business and the average balance of the customer. The balance account has something to do with the size of the loan the bank grants to the customer. The rule of the eastern banks that I have been dealing with (281) is that the balance should be twenty per cent of the amount of the loan; we are just getting to the point where we are introducing these eastern customs into our banking practice in Spokane and we haven't got up to as high as that percentage. In 1915 there was no fixed rule. Sometimes we ran as high as twenty per cent, sometimes as low as five per cent. (282) In December, 1915, the Stack-Gibbs Lumber Company showed an average balance of $4,000 and on January 11, 1916, it was $8,000. The first time I heard of a meeting that was to take place in Minneapolis, was sometime in January. (283)

I discussed it with Mr. Gibbs. I think a man was sent up to Gibbs to look over the plant. I left for Minneapolis the last week in January and just before I left I charged off the Fifteen Thousand Dollars. (284) I do not know why I did not send the notes right back. We charged the whole Fifteen Thousand Dollars off on the 24th or 25th of January and charged the company with interest up to the 12th of February. I told Mr. Gibbs about it. The check that you show me, signed by the Stack-Gibbs Lumber Company by Mr. Gibbs together with

the voucher is the check and voucher and my letter showing the payment of interest up to that date. (285) Apparently Mr. Gibbs did not object to paying me interest after we charged it off and we made no objection to receiving it.

Q. I will show you the first set of notes issued by the Stack-Gibbs Lumber Company which are marked Petitioner's Exhibit No. 32; were those notes with the endorsement without recourse when they came to the Exchange National Bank?

A. Yes, sir.

Q. What did the Exchange National Bank do if anything upon the receipt of the notes at the various times they were received—I do not want to interrogate about each note because I assume the practice was the same in respect to each note; is that right?

A. Yes.

Q. What was the process you put them through at the Exchange Bank?

A. When these notes were brought in by the Mechanics Loan & Trust Company they were credited to the account of the Stack-Gibbs Lumber Company.

Q. That is the actual money was not given to the Mechanics but the actual money was credited direct to the Stack-Gibbs Lumber Company?

A. Well there was no money passed in any case but whether the Mechanics gave a check for some of those notes I could not say.

Q. You didn't give any to the Mechanics did you?

A. No.

Q. You gave a credit in each and every instance

to the Stack-Gibbs Lumber Company, isn't that correct?

A. That is my recollection, there might be a check of the Mechanics given representing the note just as a closing entry on the books.

Q. Don't you recall a meeting in your office where you were kind enough to show Judge Canfield, Mr. Weinstein and myself your record and I think Mr. Post was there and we ran it down to show that the credit went direct to the Stack-Gibbs Lumber Company and the Mechanics didn't have any checks or anything else, they brought the notes in and the credit went direct to the Stack-Gibbs Lumber Company?

A. That question was never asked and I didn't check it up from that angle. (288)

Q. Don't you remember I asked you if the Mechanics had advanced any money at all here and you said no the advancement had been made direct from the Exchange to the Stack-Gibbs?

A. I do not recollect any such conversation taking place.

Q. Can you examine your records this evening and if you have any records showing any credit given on the books of the Mechanics to the Stack-Gibbs Lumber Company will you kindly produce them here?

A. Yes.

Q. I hold in my hand petitioner's exhibit No. 32, then petitioner's exhibit No. 31 were given in renewal where they not Mr. Coman? (289)

A. That was the practice.

I have here the sheets of the bills receivable or copies of them showing how we carried this account on the Exchange National Bank books which I am producing. The first notes under this One Hundred Thousand Dollar loan was February 10, 1916. The record shows the disposition of those original notes, what became of them, whether they were renewed or paid—they were renewed. The record shows what became of the renewal notes, they have been charged off in part, charged to profit and loss.

Q. And they are carried how on the books of the bank—

Mr. Post: The books of the bank are the best evidence.

Mr. Adams: The witness was sworn and the books were requested and they said they would be here.

Mr. Post: What you asked for are here I think, but you are now talking about something which according to my recollection you didn't ask for.

Q. Mr. Coman, will you turn to the record showing what records you have of the present notes?

Mr. Post: Well find out whether the records show they were turned over to the Mechanics Loan & Trust Company.

Mr. Adams: I was going to ask a question and you stopped me, but I think now I will stick to the record.

Mr. Post: Ask it straight out.

The Witness: Part of the notes have been charged off and part of them appear on the books of the bank, (291) under bills receivable.

Q. I show you exhibit No. 31 which you say were received by the Exchange Bank in renewal of claimant's exhibit No. 32; after you received them in renewal did you ever turn them back or deliver them to the Mechanics?

A. Why not during the course of business no.

The Witness: They were delivered to the attorney.

Q. Who?

A. Mr. Russell I think was handling the matter then.

Q. Who delivered them to Mr. Russell?

A. The officers of the bank.

Q. And is Mr. Russell the attorney for the Exchange National Bank?

A. He is sometimes. (292)

Q. That is the firm of Post, Russell, Carey & Higgins, and did you receive anything from Mr. Russell for exhibit No. 31 when you delivered them to him?

A. I was out of the bank, was away on my vacation at the time this occurred, but the custom is to take a receipt from the attorney.

Q. Will you please produce that receipt when you are at the bank?

A. Yes, sir.

Q. Did you receive any money or other consideration from anybody?

A. I should say not.

Mr. Post: Just wait a minute, this is calling for a conclusion.

Q. Did you receive moneys, or properties, or credits or anything of that character; did it receive any-

thing other than the receipt you have just mentioned?

A. It received no money.

Q. Did it receive anything else than the receipt you have just mentioned? (293)

A. No, sir.

Q. Now the bills receivable ledger which you showed, the daily items on there, appears C. D. Gibbs, endorsed Stack-Gibbs Lumber Company, wasn't it the custom of the Exchange Bank with reference to the Stack-Gibbs Lumber Company to have some officer sign that balance account note and it was endorsed then by the Stack-Gibbs Lumber Company and the money credited to the Stack-Gibbs Lumber Company; wasn't that the manner of handling the account?

A. That is a very involved question and I do not know that I get it all.

Q. I do not want any misunderstandings about any questions that I ask. In this particular instance the record shows the maker to be C. D. Gibbs?

A. Yes, sir.

Q. Endorsed Stack-Gibbs Lumber Company?

A. Yes, sir.

Q. Now to whom did the credit go, the money itself?

A. Why $5,000 of it went on a certificate of deposit that was retained by the bank.

Q. And the Ten Thousand?

A. Why the Ten Thousand went to the credit of this balance account which was called Stack-Gibbs account No. 2.

Q. Now that wasn't the first time that had been done?

A. No, sir.

Q. And it was the custom was it not that some officer of the Stack-Gibbs Lumber Company would sign as maker in that balance account and the Stack-Gibbs Lumber Company would sign as endorser and the credit would go to the (294) Stack-Gibbs Lumber Company, wasn't that the custom followed?

A. If I answer that I will say part was the custom and part was not the custom.

Q. In the balance account?

A. Yes.

Q. What was it—who signed the balance account note before that one?

A. I do not remember whether it was Mr. Cleland or Mr. Tolerton.

Q. Didn't all of us in your bank that evening go over this very document the pages we got there and follow the run of that balance account—I am not asking you anything new?

A. This is all there is to this balance account what I showed you.

Q. That particular item?

A. Yes.

Q. Wasn't there one ahead of that?

A. The balance account before that was apparently all signed by Mr. Tolerton.

Q. And endorsed by the Stack-Gibbs Lumber Company?

A. Yes.

Q. And the credit went to the Stack-Gibbs?

A. No.

Q. Who did the credit go to?

A. That was carried on the books to H. B. Tolerton.

Q. Under special account H. B. Tolerton? (295)

A. Yes, sir.

Q. And the one before that?

A. It was a three thousand dollar Cleland note.

Q. Who was that carried under—who did the credit go to there, Mr. Gibbs, or the Stack-Gibbs Lumber Company, or Mr. Stack or Mr. Cleland?

A. That dates back so far I do not think I have that here,—I find it now,

A. H. F. Cleland.

Q. Who paid the interest on those too?

A. It was in every case paid by the Stack-Gibbs Lumber Company.

Q. And that was the method or how the account was handled just the way you have named here?

A. Yes, sir.

Q. Sometimes it would be one officer and sometimes another officer?

A. Yes, sir.

Mr. Adams: Mr. Coman said he might not wish to come back tomorrow if he couldn't find anything showing any credits between the Mechanics and the Stack-Gibbs Lumber Company—

Mr. Coman: I can answer the question now after having conferred with Mr. Rea—there were no checks passed.

Q. No checks between the Mechanics and the Exchange?

A. No, sir.

Mr. Post: You mean as to this matter?

A. Yes, sir.

Q. No credits there at all?

A. No, sir.

The Referee: By this matter, Mr. Post, you mean—

Mr. Post: This One Hundred Thousand Dollars.

Mr. Adams: Between the Mechanics Loan & Trust Company and the Exchange National Bank.

The Referee: And the Stack-Gibbs Lumber Company.

Mr. Adams: The credit was given direct to the Stack-Gibbs Lumber Company on the books of the bank.

The Referee: You mean the Exchange National Bank?

Mr. Adams: Yes, is that right Mr. Coman?

A. Yes.

Q. The receipt you will send by Mr .Post will you please?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Post:

The Witness: I do not know whether Mr. Russell gave a receipt or not. I was not here when the notes were delivered, I was in Missouri. I do not know whether the bank got from Mr. Russell any promise or any other thing or from the Mechanics Loan & Trust Company except that they didn't get any money. I am only testifying to the general

practice in such matters. I wasn't in the bank at the time and I don't know whether Mr. Russell on behalf of the Mechanics or Mr. Rea promised if those notes were turned over to the Mechanics that they would file the claim here as a preferred claim against the Stack-Gibbs Lumber Company in the bankruptcy proceedings based on those notes. I do not know what the bank did get from Mr. Russell or the Mechanics when the notes were turned over. In regard to the interest that was charged up to February 12th on the Fifteen Thousand Dollar notes, I do not know why interest was paid up to February 12th except that all we could get out of the Stack-Gibbs Lumber Company was that much clear gain. (298) In regard to the added interest up to February 12th, I had nothing to do with it personally, I suppose it was handled by the note teller. I do not handle those matters myself.

Q. You do not know anything about it personally except that you find that record?

Mr Adams: I beg pardon, his letter is signed by him.

Q. The letter signed by you acknowledging receipt of those are—but why it was charged up to February 12th do you or do you not know?

A. Know why it was charged up? I know of no reason but to get the money.

Q. But your attention was called to this that you cancelled those notes January 25th; why did you charge interest beyond January 25th up to February 12th?

A. I do not know.

Witness states that he doesn't know whether Mr. Russell gave a receipt or not, as he was not in Spokane when the notes were delivered, but was in the State of Missouri, and that he doesn't know whether the bank got from Mr. Russell or the Mechanics Loan & Trust Company any promise or any other thing, except he knows the bank did not get any money; that he doesn't know whether Mr. Russell or the Mechanics Loan & Trust Company promised the bank to file the claim as a preferred claim, as he was not in the bank at the time.

It is admitted by counsel for the trustee and all of the creditors that the Mechanics Loan & Trust Company was qualified to do business in the State of Idaho on the 3rd day of January, 1916, and has been since qualified and has complied with the laws of the State of Idaho relative to foreign corporations doing business in that state.

RE-CROSS EXAMINATION.

By Mr. Adams:

The Witness: If the Exchange Bank in the course of business received any moneys or properties or written documents or anything of that character from Mr. Russell, they are in the possession of the bank or some officer of the bank, or some part of the bank's properties, and could be found if we received anything. Whatever was received from Mr. Russell or anyone else for Exhibit No. 31 I will produce in court. (301) In December, 1915, we were carrying accounts, assigned for the Stack-

Gibbs Lumber Company—no, that was January 21st, 1916. That is an odd amount there that I assume was an assigned invoice. It was $1389. The account didn't amount to much until Mr. Katz came here when we commenced to handle the company's assigned accounts. That was on the 14th day of February.

We frequently threw out the checks of the Stack-Gibbs Lumber Company to prevent their overdrawing.

Mr. Adams:

The Witness: Their overdraft would sometimes be a few thousand dollars. (302) I do not believe that it ever went to ten or twelve thousand dollars. On December 21st, it was $5,804.30 and on December 15th it was $37,271.05—that is December 15th, 1915.

By Mr. Post:

Q. What was it the next day?

A. The next day there was a balance; evidently a remittance in the mail to cover that. (303)

RE-CROSS EXAMINATION.

By Mr. Adams:

Q. You didn't throw all their checks out that day did you?

A. Evidently not; well I am not certain that was overdrawn that day because it appears here—you see they make two entries here, we have two clearings in Spokane a morning and a noon clearing and often times the account will show on the first strike that it is overdrawn but there will be deposits

in the mail or there will be deposits in some other department that will come in and put the balance on the right side before the bank closes; as you see here in a number of cases—now on the first strike on December 13th shows overdrawn $3116.80 and when they closed that night they showed a balance of $128.95. On December 15th there was only one strike and that was an overdraft of $37,000; and on November 30th, we started with an overdraft of $6238.32; and on December 6th there was an overdraft of $1136.86. On December 7th, there was four transactions on that one day. Three of them showed, the first three showed overdrafts around Nine Thousand Dollars and ended up with a net balance of $35.98 but that does not mean anything. (304) It means when they got through at the close of business that day they had a credit balance of $38.95. On December 9th there was an overdraft of $2,214.-02, December 11th a net balance of $33.20.

Witness Excused. (305)

Frank T. Post, a witness produced on behalf of the petitioner, after being duly sworn, testified as follows:

EXAMINED BY HIMSELF.

The Witness:

My name is Frank T. Post and I am a member of the firm of Post, Russell, Carey & Higgins of Spokane. The minutes of the stockholders' meeting held on the 18th day of February, 1916, of the Stack-Gibbs Lumber Company were drawn by myself. I attended that meeting and that meeting was held on

February 18, 1916, just as is set forth in the minutes I drew. The same is true as to the meeting of the stockholders of the Dryad Lumber Company which minutes are already in evidence.

Either at that meeting or before that meeting, I cannot say which, I had a conversation with Mr. Katz in which I spoke to Mr. Katz about the fact that he was there representing—as the representative of the Mechanics Loan & Trust Company as Trustee and that responsibility was upon him of running that business. What his answer was in relation to it I can't say absolutely except that he heard what I said and acquiesced in it. That is all.

CROSS-EXAMINATION.

By Mr. Canfield:

The Witness: The conversation that I had with Mr. Katz was at the meeting of February 18th or before that according to my best recollection. (306) But I have no recollection where the conversation occurred nor who was present but my recollection is that it was at this meeting, that is what I think about it but of course I am not sure. There were not many there but I wouldn't say there was anybody present; I do not think there was anybody present, that is I think I didn't have this conversation in the presence of Mr. Gibbs. Mr. Cleland was in the building at the time we held this meeting, but my idea of it is, my recollection is that my conversation with Mr. Katz was not in the presence of either Mr. Cleland or Mr. Gibbs. The minutes were originally written in my office in Spokane before I went to Gibbs

but there were some changes made at Gibbs in the minutes or at least at one of these meetings; my recollection is those changes are interlineations in my handwriting; I do not think—I wouldn't say positively without seeing the minutes themselves whether (307) any part of it was typewritten there at Gibbs. I do not remember whether I went to Gibbs alone or not. We had a formal meeting and the minutes were read. Whoever these minutes say were present were present I think, with one exception—I think that is not correct—the Stockholders meeting of the Stack-Gibbs Lumber Company says —this is the stockholders meeting—Present C. D. Gibbs, Tolerton—as a matter of fact there was present, Gibbs, Cleland, Katz and myself. Mr. Tolerton was not present but his signature was obtained to the minutes I think the same day or the next day and the reason I think that is because of the conversation I then had—he was to be there, he was notified to be there and expected there but they figured out he was drunk and didn't get there which was his unfortunate position once in a while—and they were going to get him to sign these minutes and then within a very few days I got a certified copy of the minutes with his name signed to them, the same being certified by Mr. Katz. Mr. Cleland was there at the meeting of the stockholders (308) of the Stack-Gibbs Lumber Company. I have reference then to the time I had this conversation with Mr. Katz, that Mr. Cleland was there in the building but I do not think he was there — present when I was

talking to Mr. Katz about this matter because I didn't intend to discuss matters with Mr. Katz in the presence of Mr. Gibbs or Mr. Cleland; I was impressing upon him that the responsibility was upon him, that that was what he was there for. We held a Board meeting as well as a stockholders meeting and the minutes were prepared by me in the same way. The typewritten document that I prepared before I went down there was used unless there were some changes made which I could tell if the minutes were here. If any changes were made they would be in my handwriting upon the minute book. I cannot say whether the conversation with Mr. Katz occurred before or after the meeting. (309) I remember who was there during the time I was there but I can't remember whether it was on this occasion or another occasion that I waited for a long time for a train to come along; I know I was there quite a while on one occasion and whether this one or not I am not sure; I went on one occasion with Mr. Katz around through the mill after we had fussed around and according to my recollection I know I did with somebody and I think it was with Mr. Katz—I might be mistaken about that as to whether I went through the mill with Mr. Katz but I remember going through it. At the Board meeting all the trustees were at the meeting, Mr. Gibbs, Mr. Cleland, Mr. Katz and I were there, and at the Dryad meeting there was Mr. Nelson, Mr. Cleland and Mr. Katz, the trustees of that.

Witness Excused. (310)

J. V. Rea, a witness called on behalf of the peti-

tioner, after first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Post:

The Witness: My name is J. V. Rea. I am Secretary and Manager of the Mechanics Loan & Trust Company and have held that position for four or five years. A part of the business of the Mechanics Loan & Trust Company is to act as trustee under various mortgages, deeds of trust, etc. They also loan money and take real estate mortgages as a part of their business. We kept a record of the notes that were given by the Stack-Gibbs Lumber Company and in a book that I have in my hand these records are kept. (311) The cashier kept the record. His name is William H. Kaye and these entries are in his handwriting. This record was made up at the time the notes were issued, presented to us and we made the notation and then took them down to the bank. When the notes came, they were entered in our book and then they were taken down to the bank, I mean the Exchange National Bank of Spokane. Our office is in the Exchange National Bank Building. The entries were made as the renewals came also on this book here and the renewals would come to the Mechanics Loan & Trust Company and then the renewals would be taken down to the bank. (312)

CROSS-EXAMINATION.

By Mr. Adams:

The Witness: Referring to the book, this is the

first page; I think they start here and then it turns back you see, this is really the start. There is no special reason why these pages are pasted together except perhaps that we had some other business in there that was dead—that was killed. These entries were made at the time the notes came in. The first column is not necessarily the date of the instrument but it is supposed to be. The notes are supposed to be entered according to the dates that they come in, that is practically all of them and this entry is made from the notes themselves. (313) There is no reason why we did not put the correct date in there unless it was a mistake, unless it was copied wrong off the note, but that was the intention to put the date of the note. Commencing all over again; the date here is supposed to be the date of the instrument, the next is the name of the maker and the next is, according to the book here, to whom it is payable, but that wasn t the fact. This book is not a true statement of the instrument according to that one feature. I personally knew about the transaction. When a note came in, for instance February 9th, 1916, the date of the instrument, I am assuming it came in sometime about February 9—10th or 11th—in there some place—it was brought to the Mechanics. I do not think the Mechanics gave anything to the Stack-Gibbs for the very first note. They took the note with the endorsement which appears upon it in the record among the notes in Exhibit No. 32 and took it to the Exchange National Bank. (314) The Ex-

change National Bank did not give anything to the Mechanics but gave the credit direct to the Stack-Gibbs Lumber Company. It was not carried then as the Exchange National Bank owner, but the entry was made before it was taken down to the Exchange National Bank. I do not know why they entered here, the Exchange National Bank. That is the only explanation I have is that it is a mistake, that is all. I didn't put it on, I instructed the cashier to take the notes or the note the same as they did all the others. Those items that you are pointing to are in all probability, the original notes. The renewals are in here some place. (315) —That is the old note and that is the original note and here is the renewal note. We have struck out the date and entered the date, that would be the date of the renewal note at the time it was due.

Mr. Adams: We desire to offer this book in evidence with leave to substitute a copy or such portions as we may desire.

The Referee: It will be admitted. (316) The same was marked Exhibit 51.

The Witness: There is a reason why this was entered on the last two pages of the book because it is used for other transactions of the company, other notes. It is our habit to borrow money from the bank from time to time. There are eight pages in the front of this book that are devoted to other business and there is,—I would say fifty pages in all. I do not know why these pages are pasted together. I can see that there is some writing on

them. (317) I do not know whether there is anything between the pasted pages referring to this transaction.

The witness was excused and whereupon an adjournment was taken until February 20th, 1917. (218)

William H. Kaye, a witness called on behalf of the petitioner, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Post:

The Witness: I am the Assistant Secretary of the Mechanics Loan & Trust Company and have held that position for a little more than four years. With reference to Exhibit No. 51 or certain pages of that book, that is in my own handwriting and I made those entries on or about the date set out here. By on or about, I mean on that same day or the day succeeding. The same is true with reference to the other notes, it was either on the day of the note or the day succeeding. (319) The first page that I made the entry on is the page containing the note dated February 9th, 1916. That is the page that is marked as an exhibit here and the word Stack-Gibbs appears at the top. Now with reference to the two pages stuck together, after this page had been completed, I found that it was the last page of the book and the succeeding notes had to be entered on the page preceeding; well now there was a note dated April 8th and through some omission it was not entered upon this book and the note

came due in July and the July note was entered and later I found the July note was a renewal of the April note and was not a new indebtedness; in order to make the statement complete I started a new page setting forth the April 8th note in its proper order and did not show the July note because it was a renewal of the April note and in order to rewrite the notes as they came due I simply crossed out the due date of the original note and set opposite the due date of the renewal note. Now on the April note it came due on July 7th and that is the note that appears on the last line of the page that is pasted; the reason for pasting the page was this; I was afraid that anybody looking over this notebook in my absence and having this intervening page might miss the succeeding notes on this page. They had to go backwards instead of forwards, (320) which was unusual of course and in order to obviate that possibility I simply pasted those two pages together so that the succeeding notes would appear immediatly succeeding the first notes. On the first page commencing February 9th, 1916, there are eighteen notes on that page and after I had entered those eighteen notes I had to turn backwards because that was the last page; and on the pages that are pasted, I had already some notes. On that page, I had entered the first note May 11th and there are five entries on the page. The first note dated April 8th was omitted on this page but the other four entries are identical. (321) Now in regard to my no-

tation here that reads Stack-Gibbs Lumber Company in favor of the Exchange National Bank under loan, etc., I had no instructions from anybody as to how to make those entries. That was simply an office notation to show the disposition of the notes, what we had done with them; that "in favor of" should be stricken and the words "delivered to" inserted, simply to show the disposition of the notes in case we were called upon to show what we had done with it.

Mr. Post (to the attorneys): Gentlemen, if you want to separate them, you have that privilege, so far as we are concerned, we would be pleased to have you.

CROSS-EXAMINATION.

By Mr. Adams:

The Witness:

This book is the bills payable book. We do not keep more than one book of that character in the Mechanics Loan & Trust Company, (322) and this is the record of all the notes payable in the Mechanics and an examination of the book will show all of the notes payable the Mechanics had issued. The reason that I did not keep the book right along in the regular course was that we wished to keep these notes separately so that we could at any time refer to the whole account and have it all together. This is the only account we had along that line although we had other notes payable to us. The other notes, we separated them in order as to date. They came right along in order of date,

the same as an ordinary bills payable book except these particular items and these were in the back of the book. (323) I did not discover that I was working on the last page until I had the page filled. No one told me to put it in the back of the book, I just did it myself. There is no reason why I should keep these notes separate from the bills payable except that I wanted to keep them together. We were to keep it up to One Hundred Thousand Dollars, that was my understanding, and it was easy to refer to it at all times to see the amount that had been used. The fact that the Mechanics was an endorser and might be liable on the notes did not make any difference where I might put it. (324) My recollection is that I saw the first notes when they came into the Mechanics and that I made the entries from them. I think I recollect the first note Petitioner's Exhibit No. 32, dated February 9th, 1916, and as far as I remember it had the endorsement on the back of it, "pay to the order of blank without recourse, Mechanics Loan & Trust Company, by J. V. Rea, Secretary." I believe that I got that note from Mr. Rea and endorsed it in this book and then delivered it back to Mr. Rea. All I had to do with it was entering it into the book. (325) Some of these notes were endorsed by myself as Assistant Secretary and those I got from the Stack-Gibbs Lumber Company by mail. After I would get them I would take them down to the Exchange National Bank and I would leave them with the note teller, most of the time with Mr.

Lewer. As far as I was concerned then the transaction was complete.

Q. You stated you took them to the note teller's window of the Exchange National Bank and left them there; did you receive anything from the Exchange National Bank either for yourself or for any other party whomsoever for the note or notes which you left there?

A. I received nothing in writing.

The Witness: As to the renewal notes, Petitioner's Exhibit No. 31, some of them I received from Mr. Rea and some by mail from the Stack-Gibbs Lumber Company. (327) I made notations of these renewal notes in the due dates in our book. Mr. Rea gave them to me and I returned them to him. If I got them by mail I would deliver them to the Exchange National Bank as I did the original notes. The same kind of a transaction was had except with the renewal notes I would receive back the original note that the subsequent note was a renewal of.

Q. We will pick out one set so that we may have it as an example; take one of the original notes and one of the renewals—one of the renewal notes that renewed one of the original notes.

A. That would be a renewal of one of the February notes.

Q. Pick out the February note please?

(Witness hands counsel note dated February 9, 1916, Petitioner's Exhibit No. 32, $5,000 and note for $5,000 dated May 9, 1916, Petitioner's Exhibit

No. 31, the numbers on the notes in red ink, number of the first note is No. 27730 and the number of the second note is No. 29800.)

Q. Upon your taking note No. 28900 to the Exchange National Bank of Spokane, delivering it to the note teller's window, you received note No. 27730?

A. That presumably; of course these are picked out promiscuously and I do not know whether that is an original renewal of that note because there are eight notes of that same day. (328)

Q. Presuming that is, that would be the method you followed?

A. Yes, sir.

Q. Was the note stamped paid by the Exchange National Bank when you received it?

A. Yes.

Q. I assume the signature hadn't been torn out of it?

A. No, that was done later.

Q. That was the method followed with respect to the renewals?

A. Yes, sir.

Q. Now I want to show you note numbered 29733; can you tell the Court when you first saw that note?

A. I cannot determine that, presumably on that date.

Q. Do you know where you got the note from?

A. I got this note from Mr. Rea as I remember it.

Q. Are you sure about that?

A. No sir, I am not, but that is the only method I would have of receiving it.

Q. That is the best recollection you have, you got it from Mr. Rea?

A. Yes sir, for entry.

Q. Do you know what you did with it?

A. I entered it on the record. (329)

Q. Would that be true also of note No. 29734?

A. Yes.

Q. Now, Mr. Kaye, is there any reason why there should be any change in your record as to those two notes as to whose favor they are?

A. It is my recollection that these two notes were negotiated direct by Mr. Katz with the Exchange National Bank on one of his visits to Spokane.

Q. Now Mr. Kaye, so that Mr. Post's statement may not go unchallenged—is it true all of the rest of the notes are to the Mechanics Loan & Trust Company (handing witness a bunch of notes), isn't there four more you have in your hand now to the Exchange National Bank?

A. All these are renewal notes.

Q. I am not asking you what they are, I am asking you if they are not payable to the Exchange National Bank and if you did not enter them on the book you have in your hand there?

A. Yes sir I did.

Q. Now is there any explanation why there should be any change in your record in respect to those four notes?

A. I might add that these notes are renewal notes and the Exchange Bank having in its possession the

original notes presumably these notes were made directly to the bank to pay them, or to take up the original notes; that is my own surmise, I do not know that that is a fact.

Q. Have you any other record, the Mechanics, respecting these notes, than what you have on your knee there?

A. No, sir. (331)

The Witness: I think that I re-wrote the preceding page from the last one here about in July, 1916, about July 7th. There appear here five entries. I tried to explain to you that the July item was the renewal of the note made in April. The April item was omitted for some reason or other, it was not entered on this sheet that was pasted (332) and when the July item came up I found that no note had been entered for April of which the July note was the renewal, so I started this sheet in July, putting the April note first so that the notes would be in their regular order. The corrected sheet, Exhibit No. 51 and I didn't enter the July note because it appears here. Under July, that (indicating) that is the July note. That is a renewal of the April note, July 7th.

Mr. Post: With the red line across it, that means renewal?

A. Yes, sir; that was extended again until October 5th; that same thing happens down here.

Mr. Post: The same thing occurs on the other page, does it?

A. Yes, it does.

Mr. Post: The record may show that these pages are in evidence.

There was no objection and they were admitted as petitioner's exhibit No. 51. (333)

The Referee: If a full, true and correct copy of such pages as have been identified and admitted were filed and a photographic copy made, I think that should be amply sufficient; I will let the matter so far as the delivery of the book over to the court is concerned stand with the observation submitted; I will hear you further in the event you think it would be absolutely necessary to have the original in court; as far as I am able to see I hardly think it necessary at the present time. (334)

Mr. Adams: I would like to ask him a couple of questions. I want again to show you the yellow note No. 29733 and No. 29734; is there any way of telling whether those are the last two notes or not?

A. Yes, sir, these are the last two notes.

The Witness: I can tell by the fact that they are on demand; (335) that capital "D" means demand.

I haven't the least idea at all; whether the endorsement was on the back of the note at the time I entered them in the book. There was no particular reason why I should pay any attention to that when entering them and I did not and I can't tell you whether it was on there or not. As to when I entered them on the book, presumably it was on the day they were made out, but then there is no reason I can tell you exactly the day because there is no particular — I mean no particular attention

was paid to them, except my usual custom to enter the notes the day that they were made. (336) My impression is that I was in Alaska at the time of the bankruptcy proceedings were brought and it is my impression I went about the middle of July and returned about the beginning of August. I did not enter these notes after I returned from Alaska, I am positive of that. To my knowledge, no entries pertaining to this record were made in this book after July 11th. (337)

RE-DIRECT EXAMINATION.

By Mr. Post:

Q. You have been asked about four notes by counsel dated May 16th, 1916, that you say are renewals that are under the Exchange National Bank and you said that you entered them in your book; now in what form did you enter those in your book?

A. Simply to place the due date of the renewal note after the entry.

Q. Will you show that to the Court here; did you or did you not write in your book in making the entry, the words Stack-Gibbs Lumber Company, the words Exchange National Bank the word loan, etc.?

A. All of this.

Q. Now as to these four notes did you write when you entered these four notes did you write all this anew in your book, Stack-Gibbs Lumber Company?

A. No sir.

Q. The words "Exchange National Bank"?

A. No sir

Q. What did you put in your book, show the Court, what word and say it loud enough so that the stenographer will get it?

A. These notes are renewals of notes—

The Witness: Now these four notes are the renewals of the notes dated February 16th. (338) The originals of which these notes are the renewals were dated February 16th, and they were due on May the 16th; on May 16th these notes were sent to us by the Stack-Gibbs Lumber Company and all I did was simply to enter in this record the due date of the renewal notes which was August 14th; I simply crossed off the 16 and put the 14 under this August column showing the due date of the renewal note; that is the only entry that was made pertaining to those renewal notes that appear on Exhibit No. 51. With red ink I crossed off the figure 16 under May and under August I put the figure 14 which denoted the due date of the renewal note.

Q. (Mr. Post) (to Mr. Kaye): I have offered these gentlemen the opportunity of opening these up, you can get hold of some steam here and open these pages up?

A. I will try, yes.

Counsel for the objectors stated that they had filed answers to the petition of the Exchange National Bank. Counsel for all parties stipulated that the petitions of the trust company and the bank and the proceedings thereon might be consolidated.

The Referee: The record may show that the

amended claim of the Mechanics Loan & Trust Company and the petition of the Exchange National Bank being consolidated are to be tried together and considered together as one proceeding.

E. T. Coman, being recalled as a witness for and on behalf of the petitioner, the Mechanics Loan & Trust Company and the Exchange National Bank, testified as follows:

DIRECT EXAMINATION.

By Mr. Post:

Q. Now, Mr. Coman, you have heretofore testified that you were in Minneapolis at the time the Trust Deed was prepared, that you had a conversation in relation with it with the other creditors on the subject as to whether the Mechanics would borrow the money or get the money from the Exchange National Bank or not which it advanced under the Trust Deed; I wish to ask you what that conversation was?

Mr. Adams: We want to renew our objection, incompetent and immaterial and cannot change the written contract by contemporaneous oral agreement or any conversation with respect thereto. (349) And I want to add the further objection, if I may, I want to further object on the ground that the testimony will tend to change and alter the contract as represented by the notes, Exhibits No. 31 and No. 32 and is therefore incompetent and immaterial. You cannot change the contract as represented by negotiable instruments by oral testimony.

The Referee: The objection is overruled.

Mr. Adams: Exception to all the rulings.

Mr. Adams: I want to make another objection for the record and that is that there is no authority shown as far as the parties who have answered the petition here are concerned to make any other or different contract or enter into any other or different arrangement than that set forth in the writing, Exhibit A attached to the petition of the Exchange National Bank, and any conversation tending to alter, change or make any different or other arrangement or understanding is improper unless there is some authority shown to bind the other parties to the alleged conversation.

The Referee: That objection in my opinion is more nearly vital than the others, but I shall overrule it for the purpose of the record, reserving as in the first instance the privilege to counsel to move that this testimony be stricken and the Court's reserving to itself the right to consider all this testimony together and to give it such legal weight as it may deem proper.

Mr. Adams: We would like to have our proper exceptions shown.

The Referee: Let the record show the exceptions.

The Witness: Yes, sir.

Q. The question was—relate the conversation.

A. Why, most of the conversation on that point was by Mr. Fletcher; he wanted to know—

Q. Who is Mr. Fletcher?

A. He is the vice-president for the Fort Dearborn National Bank; he wanted to know what the respon-

sibility of this trustee was and I stated that while the capital was only $10,000 that through an arrangement with the bank it could get the money to carry out the terms of this contract.

Q. By the bank?

A. The Exchange National Bank, then Mr. Fletcher made the objection to the rate of interest charged. We had charged the Stack-Gibbs eight per cent and I believe I offered to (350) make the rate seven per cent, and there was quite a little argument back and forth—I do not attempt to state all of it—but Mr. Fletcher represented that this would be such a gilt-edged loan with all—

Mr. Adams: I object to that; let the witness state what Mr. Fletcher said.

Q. Yes, what he said?

A. He said that this would be a secured loan and therefore shouldn't come under the same class as our previous loans to the Stack-Gibbs, the other creditors were waiving their rights to these assets and there was ample property there to repay it and therefore we ought to reduce the rate and I finally agreed to come down to six per cent.

There was another matter which I omitted which was discussed at the same time and that was the amount to be advanced; it was originally contemplated that the amount should be Fifty Thousand Dollars and my recollection if it serves me right is that we first—no, for the first day in our negotiations fifty thousand dollars was discussed but after we got through Mr. Fletcher suggested before the

contract was finally drawn up the amount was raised to One Hundred Thousand Dollars, he making the statement that he had had experience in a great many of these transactions and if we made the amount fifty thousand dollars and it was found that one hundred thousand dollars was necessary then it would require another meeting of all the parties to the agreement, but that by reason of putting the amount in at one hundred thousand dollars it wouldn't involve the advancing of it if it wasn't found necessary.

Mr. Adams: I am assuming that this is all going in under our objection, if the Court please.

Mr. Post: Yes, that is right.

The Referee: Yes.

Mr. Adams: Then I will wait until it is all finished and then I will make my motion.

Mr. Post: This conversation you had you have related you referred to Mr. Fletcher doing the talking; did any of the other creditors do any talking about these things?

A. Why, yes, as in any conference where there were eight or ten men participating one would have something to say and another would have another remark to make, but the conversation with reference to the amount of the advance the rate of interest and the responsibility of the trust company, those inquiries were put to us for the most part by Mr. Fletcher.

Q. The other creditors whom you have heretofore named were they all there at the time?

A. Yes, sir.

Q. So far as you now recollect you have related all of the conversation that pertained to the particular subject of how the Mechanics should get the money; you remember any other conversation relating to that subject?

A. Well, no; well, these negotiations, you must understand, extended over a period of a couple of days and many hours of conversation on all subjects pertaining to the Stack-Gibbs affairs and what I have stated here didn't take two days to tell that.

Q. No, nor was it all said at one time—you do not know which day it was said or whether part was said one day and part another? (360)

A. It was probably said at different times on the days that the conference took place, but the most—I remember particularly this increase of fifty thousand to one hundred thousand was the windup and I remember Mr. Fletcher making the statement of his experience in similar transactions and Mr. Carpenter also said that he thought if Mr. Gibbs was properly financed he could go ahead and work his way out, that he knew from experience he had never been in a position where he could operate independently.

The Referee: You are testifying then as to the gist of the conversation that was held at this conference to which you have testified in connection with the Stack-Gibbs affairs?

Witness: Yes, sir.

Mr. Post: That is all.

Mr. Adams: May it please the Court, I want to

make a motion first to strike the testimony with reference to the amount being inserted in the contract one hundred thousand dollars instead of fifty thousand as that is explaining and giving conversation relative to a particular matter set forth in the contract and based upon all the objections which are heretofore made; I further wish to move to strike out the testimony with respect to the Exchange National Bank on the same ground that we made objection to the question and I further wish to add to the motion to strike the further objection that it does not appear by the testimony of the witness that all of the signers of Exhibit A were present at that meeting or were represented and therefore that it was not a contract or understanding with respect to all of the signers of the agreement and therefore it is immaterial and incompetent; and also with respect to the testimony about the rate of interest, that is also a matter that is specifically covered by the contract and the evidence with respect thereto is incompetent and immaterial; we are basing our motion upon all the objections which were made originally to the admissions of the answers.

Mr. Post: The matter about the rate of interest does not contradict in any way and I do not know as it is very material except as showing the interest they had in it and their feeling with respect to the value of the security on the part of the creditors; it does not, however, in any way tend to contradict the contract, for the contract says six per cent and that is what they agreed upon. The matter of chang-

ing the fifty thousand to one hundred thousand dollars, that is the part of the conversation that relates to it; it is not a matter in itself, at the most, of any vital importance, but it is a part of the conversation in relation to how the money was to be advanced and who should advance it and how it was got.

The Witness: May I see the contract, please?

Mr. Post: You want one of the originals?

A. Yes.

Mr. Post: Here is one of the originals.

The Referee: I shall sustain objection of counsel insofar as the answers relating to the one hundred thousand as agreed upon in this conference—I will sustain the objection of counsel insofar as it relates to amount of money they actually agreed upon as disclosed by the agreement in the contract, also with reference to the rate of interest inasmuch as the reference to those two items in the testimony tends to vary the terms of the written contract; as to the other objections of counsel they may be overruled. As I said a moment ago in consideration of this evidence counsel will remember it is very difficult to rule properly and correctly on each phase of a matter of this nature and I shall consider this evidence in the light of whatever legal significance the Court thinks it is entitled to considering the whole of the evidence.

Mr. Canfield: Save exception to that portion of the order which denies the motion to strike.

Mr. Adams: Counsel now moves to strike balance of the testimony.

Mr. Post: I take exception to that part of it in which the Court sustains the objection.

Mr. Adams: For record purposes I move to strike the balance of the testimony that has not been stricken out upon the grounds heretofore stated, which I assume your Honor will overrule, and I should like to reserve exception.

The Referee: The motion is denied.

Mr. Adams: Exception.

Mr. Post: State whether or not Mr. Coman, the Exchange National Bank loaned such money as it did loan, referred to by the notes in evidence, in reliance upon the arrangements that were made in Minneapolis?

Mr. Adams: I object to that as incompetent and immaterial, leading and suggestive and an attempt to vary the (368) terms of the written contract as set forth in Exhibit A and Exhibits 31 and 32 and calls for the conclusion of the witness.

The Referee: Overruled.

Mr. Adams: Exception.

A. Yes.

Mr. Adams: I now move to strike that answer from the record upon the same ground as we made objection to the question.

The Referee: Overruled.

Mr. Adams: Exception.

The Referee: I think that is largely for the purpose of completing the record in regard to this series of objections?

Mr. Adams: Yes, sir.

CROSS-EXAMINATION

By Mr. Adams:

Q. Who was present at the conversation or conversations which you related as taking place at the meeting in Minneapolis?

A. There was—

Q. I want the names of the individuals?

A. H. J. Aaron, John Fletcher, I. F. Searle, E. L. Carpenter, S. H. Hess, C. D. Gibbs, Mr. Tomlinson—I do not remember his initials—Mr. Carpenter's associate in the Shevlin Trustee, I think his name was Howard, they always referred to him as Bob—Wetmore, that is his name; Hovey Clark was in a part of the time, myself—well, there were stenographers, clerks and attorneys that would come and go from time to time during the conference.

Q. That is all.

Witness excused.

Mr. Post: That is all of our testimony.

Siegmund Katz, a witness produced on behalf of the respondent to the petition of the Exchange National Bank and the petition of the Mechanics Loan & Trust Company, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Adams:

Mr. Adams: On behalf of the respondent to both petitions, if it please your Honor, we wish to offer the check and voucher and the letter showing the payment of $153.33 of interest, and ask that it be marked Respondent's Exhibit No. 1, the same

being a letter dated February 12th, 1916, from Stack-Gibbs Lumber Company to Exchange National Bank, enclosing check for $153.33 interest for 40 days to the 14th on $10,000 and $5,000 demand notes dated 12-30-15, together with a check for $153.33 payable to Exchange National Bank, signed Stack-Gibbs Lumber Company, dated February 12, 1916, and voucher covering same.

Whereupon, the three documents referred to were marked Respondent's Exhibit No. 1 and admitted.

The Witness: The document that you hold, dated December 31, 1915, is a charge for revenue stamps on two demand notes of ten thousand and five thousand dollars.

Mr. Adams: We offer in evidence this yellow slip marked Respondents' Exhibit No. 2, the same being a memorandum charge slip for revenue stamps on the $10,000 and $5,000 notes, dated December 31, 1915.

The Referee: It will be admitted.

Whereupon, the exhibit referred to was admitted in evidence and marked Respondents' Exhibit No. 2. (368)

The Witness: Referring to the two notes being part of Petitioner's Exhibit No. 31, being Number 29,733 and 29,734, I have seen those notes before (369) and I had a conversation with Mr. Green of the Exchange National Bank with reference to those notes in the beginning of August, 1916, at the Exchange National Bank in Spokane. Mr. Green's initials are O. M. Green, and he is vice-president of the Exchange National Bank of Spokane. I called

his attention—I told him that of the One Hundred Thousand Dollars that was in controversy Five Thousand Dollars, those two identical notes, were made out in the name of the Exchange National Bank. (370)

The Referee: To what notes do you refer?

The Witness: The two notes I have in my hand here, note 7494 and 7495—that is the number of the Stack-Gibbs—Exhibit No. 31 and the one that is printed on here of the bank's number is 29,734 and 29,733—that they were made out in the name of the Exchange National Bank and Mr. Green said that it was all right, he was going to have them endorsed. (370)

Q. Now, Mr. Katz, have you made an examination of the books and records of the Stack-Gibbs Lumber Company so that you are able to state what the total amount of the indebtedness of the company was on the first day of February, 1916?

A. Yes, sir, I have made that.

Q. What was the total amount of the indebtedness of the Stack-Gibbs Lumber Company on February 1, 1916?

Mr. Post: I object to that, first, as incompetent and immaterial, and second, it is not the best evidence. I assume that the purpose of this testimony is to get at the fact whether or not ninety per cent. of the creditors signed this trust deed.

Mr. Adams: Yes, to show who actually signed it, and then it is a matter of computation. You haven't offered any evidence upon it and we thought we would.

Mr. Post: I have offered some evidence on it. I assume that it is clear that it was not the intention of the signers of the trust deed, the creditors in Minneapolis, that the trustee or anybody else representing the trustee should spend a week or a month going over the bocks of the Stack-Gibbs Lumber Company or in any other manner trying to find out what the debts were. It happens that it was an emergency meeting, as shown by the telegrams to Mr. Aaron and Mr. Stack and other correspondence; that this loan should be made as speedily as possible because of the situation of the company. Mr. Coman has testified that at this Minneapolis meeting there was presented a statement from Mr. Gibbs as to the amount of his debts, and the creditors agreed that when Mrs. Tolerton signed, this ninety per cent. would have signed, and before this particular trust deed came back here and was actually executed by the Stack-Gibbs Lumber Company, money was advanced pursuant to the telegraphic correspondence with Mr. Aaron, at least. It doesn't make any difference, as a matter of fact, how much the debts were. The only material thing is whether or not these particular creditors assumed the debts to be a certain amount, agreed as far as they were concerned the debts were a certain amount, and ninety per cent. of that amount was actually signed. So far as the Stack-Gibbs Lumber Company is concerned, it can't raise any question whether ninety per cent. signed or not; neither can the trustee, because that company got the money; that company signed the

trust deed, executed its notes and got the money. It does not appear from the record in this case that Mr. Gibbs was not the kind of a man Mr. Fletcher, Mr. Aaron, Mr. Shevelin, Mr. Carpenter and Mr. Coman thought he was. It does appear that the assets did not exceed the liabilities by a million dollars, and that this wasn't the gilt-edged six per cent. loan as Mr. Fletcher thought it would be. It is quite probable that a lot of the Stack-Gibbs debts do not appear on their books, but they were not proceeding on that theory in Minneapolis so far as this trust deed is converned.

The Witness: (Continued).

At the former hearing, I was asked to make up certain lists of creditors of the Stack-Gibbs Lumber Company and I have made it and have it here, which I will now produce. (373) I made an examination of the books and records for the purpose of ascertaining what the liabilities of the Stack-Gibbs Lumber Company were February 1st, 1916. I went over all the books that were necessary to be examined. I took the customers' ledger, the log ledger and what we call the general ledger, the operating ledger, there are three ledgers; then in support of this I examined occasionally the supporting evidence which is the vouchers, cash register and check register, and I made a trial balance and from this trial balance I made out this report. I made them separately first, not looking at the old trial balance, in fact I didn't know that there was one until I found it; then I compared it and found it to be correct. In other words,

the books in themselves (374) were correct. The document that I am handing you is the result of the labor that I have just enumerated. On the first page recapitulation of assets and liabilities, that is a recapitulation of the entire document which you have in your hand. I have mentioned each liability separately, the name and the amount.

Whereupon an adjournment was taken to 1:30 o'clock p. m.

At 1:30 o'clock p. m., Mr. William H. Kaye was recalled on behalf of the petitioner, testified as follows:

DIRECT EXAMINATION.

By Mr. Post:

I went with Judge Canfield to give the photographer those pages of this book that are marked Exhibit No. 51 to be photographed and the photographer and I unsealed those sheets that were mucilaged together, and they are here.

Mr. Post: I wish to offer them in evidence so we will have it all here, mark Petitioner's Exhibit 51-A: I would like to have the stenographer make a copy of it and let the copy go in the record.

The Referee: Yes, a copy may be substituted; is there any objection to the offer?

Mr. Adams: No.

Pages referred to marked Plaintiff's Exhibit 51A, admitted.

Witness excused.

Siegmund Katz, recalled for further direct examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Adams:

The Witness: The books and records from which I made up this statement are all here, I am pretty sure; I tried to bring them all here. This document is a comparison of liabilities and assets of the Stack-Gibbs Lumber Company, February 1st, 1916, which is the date of the meeting in Minneapolis, and July 29, 1916, the date upon which the bankruptcy proceedings were filed—petition filed. (377) They are comparative statements and the books and records as I have said, from which I compiled the entire statement, are here. I might say that July 29th, 1916, statement I took as a reference for those, the schedule which is a true copy, the bankruptcy schedule. Those are filed in this court. We have the books and records of the court, we have the complete list of items from which I got the knowledge which is spread upon those pages. They are right here.

Mr. Adams: We offer that document.

Mr. Post: I object to that in addition to the objection I made about the other, because this contains some matters not pertinent in any way to the issue. He started in with the witness to prove the liabilities of the company as of February 1st, but in this document is something else besides that; in fact, most of it is something else according to the statement he handed me. There are three pages devoted to liabilities and the rest of it is about assets. He has got it headed here, "Comparison of Assets and Liabilities." Now what the assets were on February 1st and what they were on July 29th, is not material to

the issues here, and the assets, anyway, and the value of them, can't be proven by this method. It isn't material, anyway.

Mr. Adams: So that we may meet the objection and try to save as much trouble as possible, we will introduce that portion of the statement showing the liabilities as of February 1st, 1916, and ask that that portion be copied in the record.

Mr. Post: Why not make an exhibit of it?

Mr. Adams: Because it has the other matter in there and I want to make a separate offer on that, and you can object to that and the court may rule on that.

Mr. Post: That is the three pages here, the pages he has marked k, 2 and 3?

Mr. Adams: Yes, that would cover the liabilities of February 1st, 1916. The pages that refer to the liabilities of February 1st, 1916, we offer.

Mr. Post: As I understand, Mr. Katz, you have got the books and vouchers here, and when I cross-examine you you can produce them?

Mr. Adams: Certainly.

Mr. Post: I am simply making the objection in respect to this, the objection I made before, that the matter of the amount of the indebtedness is not material; that is the objection your Honor overuled when we first started in; I am not objecting to those going in this form.

The Court: The objection will be overruled and they may be admitted when properly marked for identification.

Pages marked Respondents' Exhibits No. 3 were then admitted.

STACK-GIBBS LUMBER COMPANY.

Liabilities According to the Books on February 1st, 1916.

Notes:

C. M. Youmans Lumber Co.	$ 19,500.00
Exchange National Bank, Spokane	21,000.00
Merrill, Cox & Co.	221,370.22
Idaho Timber Co.	60,000.00
Minnie A. Gibbs	12,725.00
Fort Dearborn Nat'l Bank	107,000.00
Lumberman's State Bank	2,500.00
Jas. McInnis	500.00
D. H. Dollar Logging Co.	5,602.49
First Nat'l Bank, Lincoln	12,500.00
J. A. Thornton	6,551.45
Greer Fuel & Ice Co.	1,678.45
C. d'A. Exchange Nat'l Bank	5,000.00
Shoshone Timber Co.	5,000.00
Dan Bell	600.00
Central Warehouse Lbr. Co.	32,948.40
Loonan Lumber Co. (about)	4,239.98
Rogers Lumber Co. (about)	1,835.91
Salzer Lumber Co. (about)	4,280.00
Bardwell-Robinson Co.	3,681.40
Lampert Lumber Co.	9,559.68
Empire Lumber Co.	9,078.48
Total	$547,151.46

Notes of First and Sec. Nat'l Bank, amounting to $25,000.00, which were on books, were cancelled during February.

Log Contractors:

Atlas Tie Co.	14,228.85
John Carter	13.44
A. J. Callis	2,904.87
A. S. Campbell	327.70
D. H. Dollar	3,091.03
Mrs. F. A. Dawson	63.35
F. E. Hemmingway	1,370.59
O. C. Hopkins	116.22
W. W. Papish	17.32
J. A. Thornton	24,982.15
J. C. White	572.84
Total	47,688.36

Back Salaries:

Hugh Craigie	325.00
W. D. Richardson	264.85
Gust Prestegaard	229.24
J. A. Mullen	260.15
James McKay	263.10
O. Ludington	120.00
A. E. Lane	728.54
A. W. Lammers	200.00
Mrs. J. Hughes	32.00
Tom Devine	123.35
C. A. Cassidy	242.67
R. B. Canfield	181.90
W. A. Armstrong	570.85
C. W. Croty	77.11
W. T. Keith	79.36
Total	$ 3,698.12

Overdraft:

Exchange Nat'l Bank, C. d'A.	15,431.09

Other Open Accounts:

C. d'Al. Log Owners Assn.	105.71
J. A. d'Aoust	1,790.93
M. Sauve	40.00
St. Joe Boom Co.	644.12
Mrs. G. H. Tolerton	14,772.25
Voorhees & Canfield	1,586.23
E. T. Chapin Co.	.18
Alcorn Drug Co.	3.25
American Trust Co.	30.00
Atlas Tie Co.	36.63
Bradstreet Co.	100.00
C. d'Al. Cab & Auto Co.	4.00
City Drug Co.	5.90
Commercial Print Co.	42.75
C. d'Al. Grain & Milling Co.	311.95
C. d'A. Machine & Repair Works	.75
C. d'Al. Timber Pro. Ass'n	318.40
R. G. Dun & Co.	125.00
Ft. Doge Lbr. Agency	12.20
Home Electric & Supply Co.	.75
Interstate Utilities Co.	19.87
Koehler & Holt	4.80
Kootenai County State Bank	468.11
Kootenai Hardware Co.	10.24
Fred Kuehle	12.23
Lake City Hardware Co.	12.15
Lumbermen's Pub. Co.	156.25
Lumbermen's State Bank	11.55

Lumber World Review	37.00
Lumbermen's Review	1.00
McCrea & Merryweather	610.00
Marshall-Wells Hardware Co.	113.77
Mechanics Loan & Trust Co.	586.21
Panhandle Abstract Co.	34.00
Panhandle Abstract Co.	3.00
Powell Bros.	58.00
Red Cross Drug Co.	1.30
Remington Typewriter Co.	7.30
St. Maries Dray & Tfr. Co.	1.00
Shaw & Borden Co.	3.06
Shoshone Abstract Co.	4.50
Spirit Lake Pub. Co.	2.75
A. D. Storms	10.70
Union Iron Works	14.34
W. U. Telegraph Co., C. d'A.	53.89
W. U. Telegraph Co., Spokane	7.57
White Pine Sash Co.	293.68
E. R. Whitla	81.05
Total	$ 22,550.32
Total liabilities as per books, Feb. 1st	636,519.35

Liabilities Not on Books on Feb. 1st, 1916, But in Existence Then and Added Later On.

Back Taxes	$ 1,465.16
C. M. & St. P. material acc't	1,139.08
C. M. & St. P. Tyson Creek acc't	3,552.79
Disputed taxes	2,592.69
Mutual Life Ins. Co., loan	3,767.64
Mortgage on Spokane property	2,666.67

Balance Due Log Contractors:

A. J. Callis	1,481.15
D. H. Dollar	14,856.19
F. E. Hemmingway	1,216.70
Freight on logs	7,595.85
Total	$ 40,333.92
Grand Total of Liabilities	$676,853.27

Q. As a matter of fact, did the liabilities of the Stack-Gibbs Lumber Company decrease any from February 1, 1916, to July 29, 1916?

Mr. Post: I object to that as incompetent and immaterial. It has nothing to do with this case. It can't affect the claim of the Mechanics Loan & Trust Company one way or the other, whether Mr. Katz decreased or did not decrease the liabilities in operating that plant between February 1st and July 29th.

The Referee: I take it this question is preliminary and will overrule the objection.

Mr. Post: Exception.

The Witness: I have made a statement here of the liabilities cf July 29th, 1916. The liabilities of the Stack-Gibbs Lumber Company did not decrease from February 1st, 1916, to July 29th, 1916. In neither the February 1st, nor July 29th statement did I include in the statement of liabilities which have been offered in evidence as Respondents' Exhibit No. 3, those items upon which the Stack-Gibbs Company were either endorser or guarantor; and among them which I did not include, was the claim of I. F. Searle for $55,000, First National

Bank of Lincoln, Nebraska, $12,500, yes, that was, I think, included; S. H. Hess, $30,000, was not; J. K. Stack, $110,000, was not, and I did not include the note secured by the trust deed given by the Dryad Lumber Company to the Mechanics Loan & Trust Company of approximately $92,500 upon which the Stack-Gibbs Lumber Company was the guarantor.

Q. Now, Mr. Katz, in preparing this statement and in your researches of the records of the Stack-Gibbs Lumber Company and the records of this court, did you prepare a statement as to whether or not the business of the Stack-Gibbs Lumber Company from February 1st, 1916, up to July 29th, 1916, was conducted at a profit or a loss? (381)

Mr. Post: I object to that as wholly immaterial.

The Referee: The objection will be overruled.

Mr. Post: On what ground, if your Honor please, I was going to make some objection in respect to it, but I do not understand on what ground this can be in any way material.

The Referee: I was going to suggest that if its materiality is in doubt the court is desirous of getting before it all the facts, and, of course, give them such weight as appears to be proper.

Mr. Post: I wish to say if we are going into the question of whether Mr. Katz lost money or not in this operation there between February 1st and July 29th, we are going to take some considerable time doing it, because it can't be handled in just a few minutes and we are not going to take Mr. Katz's

word on the subject for some schedule of figures he may get up here. Now, of course, to start with, there isn't any pleading here at all. There is not any such objection filed to the allowance of our claim. They do not make any such objection in their answer to the petition filed by the Exchange National Bank. The petitions, objections and answers were read by Mr. Post.

The Referee: I think I shall permit the ruling to stand.

Mr. Post: Exception.

The Witness: It was operated at a loss.

Q. Is that a portion of the statement you have prepared, the three pages of which have been marked Respondents' Exhibit No. 3?

A. Yes.

Q. Now, Mr. Katz, was the business conducted at a profit or at a loss? (388)

Mr. Post: I object to that as wholly immaterial and inadmissible under the pleadings and their objections.

The Referee: Overruled.

Mr. Post: Exception.

A. At a loss.

Mr. Adams: Will you please tell the court what the amount of the loss was? (389)

Mr. Post: Same objection.

The Referee: Overruled.

Mr. Post: Exception.

A. $43,812.02.

Q. Now, Mr. Katz, how did you come to get up that statement?

Mr. Post: I object to that as wholly immaterial.

The Referee: It will be overruled.

Mr. Post: Exception.

The Witness: At a meeting in the Exchange National Bank Mr. Post referred to, the question came up if there was any money lost or made, and Mr. Post made a statement that he thought there was no money lost, maybe even some made, and you (Mr. Adams) made the statement that there was money lost, and at that time I know too there was money lost, there was a bunch of money lost and so Mr. Post said then, you get up a statement and go into these facts very thoroughly and get it out, and I said certainly, if I can, and he said all right, and let me have it about the first of February, and I said in order not to be charged with any partiality I will give this statement to both of you on the same date and I was under the opinion that you would be here about the beginning of February because the meeting was set for the 5th at that time, and inasmuch as the meeting was postponed (391) I kept this in my pocket until this morning.

Mr. Post: I move to strike that answer out as wholly immaterial. So far as any issue in this case is concerned, Mr. Adams, I think it is one of the facts and circumstances surrounding the preparation of that report.

Mr. Post: Because we had a disagreement on a subject and suggested that he try to get up a statement, does not authorize it to go in evidence.

The Referee: The answer relates, of course, to

the history of this document that is in evidence here, and, of course, it isn't of any materiality in itself but I will permit it to stand.

The Referee: The motion is overruled.

CROSS-EXAMINATION.

By Mr. Post:

Mr. Post: Nothing offered in evidence on this statement except the first three sheets marked?

Mr. Adams: We will offer the balance of those sheets that have not been marked, as Respondent's Exhibit No. 4.

Mr. Post: I object to it as incompetent and immaterial and also that this is a compilation of figures that states conclusions. (392)

The Referee: What is the purpose of this offer with reference to Exhibit No. 4?

Mr. Adams: The only purpose is this, if we are accused by counsel of not putting that in evidence showing how we arrived at those figures or withholding from the record any figures we are perfectly willing the compilation prepared by the witness shall be before the court and be used by counsel on cross-examination to arrive at a method by which the witness arrived at his testimony. Nothing will be hidden or kept from the court or counsel.

Mr. Post: I submit that he ought to answer the question, what is the purpose in trying to show that Mr. Katz in his operation there lost money.

Mr. Adams: No, I understood the Court to ask me why I offer Respondents' Exhibit No. 4.

This report appears to be quite incomplete with-

out Respondent's Exhibit No. 4; it isn't material. Mr. Post's objection is well taken, but in order to have the entire report together for the consideration of the court, I should overrule the objection and admit it for what it is worth.

The Referee: I will overrule the objection. (393)

Whereupon said pages were admitted in evidence and marked Respondents' Exhibit No. 4.

RECAPITULATION OF ASSETS AND LIABILITIES.

		Loss.	*Gain.*
Liabilities Feb. 1, 1916	$676,853.27		
July 29	692,774.49		
Increase in liabilities		$ 15,921.22	
Bills Receivable and Outstanding Accounts:			
Feb. 1, 1916	$ 31,360.28		
July 29, 1916	$48,609.72		
Gain in accounts			$ 17,249.44
Reduction in assets		80,568.10	
Addition to assets			16,540.36
Gain in lumber			18,887.50
Total Loss		$ 96,489.32	
Total Gain			$ 52,677.30
Total loss of Stack-Gibbs Lumber Co., between Feb. 1st, 1916, and July 29th, 1916			$ 43,812.02

Liabilities as per Schedule—July 29, 1916.

Schedule A-1:		
Taxes		$ 3,197.80
Wages and salaries		13,384.10
Schedule A-2:		
Secured	$34,434.31	
Less Sunset Timber Co.	8,500.00	
		25,934.31
(Engine was returned and liability cancelled.)		
Schedule A-3:		
Notes		557,058.77
Open account	$86,975.72	
Less Cascade Lbr. Co.	829.00	
		86,146.72
(Jammer was returned and liability cancelled.)		
Schedule A-4:		
Empire Lumber Co.		3,500.00
C. M. & St. P. Tyson Creek Ry. Acct.		3,552.79
(Bond issue and assigned invoices mentioned in Schedule A-4 are only contingent liabilities.)		
Total		$692,774.49

Bills Receivable and Outstanding Accounts, According to the Books on February 1st, 1916.

(Only those are mentioned which were good and collectible, all others on the books were no good.)

Bills Receivable:		
Gust Swanson		$ 157.46
Outstanding Accounts:		
H. F. Cleland	$ 26.29	
J. F. Cox	3,000.00	

W. A. Gibbs	190.83	
National Pole Co.	689.13	
Freight claims (about)	500.00	
Harrison Box Co.	115.16	
Hogan & West	184.18	
S. H. L. Lumber Co.	281.02	
N. P. Ry. Co.	473.72	
Balances from customers (about)	500.00	
Total		5,960.33
Deposits in Banks:		
Exchange Nat'l, Spokane	$15,431.09	
Ft. Dearborn Nat'l	14.26	
First Nat'l, Winona	238.88	
First Nat'l, Lincoln	9,558.26	
Total		25,242.49
Total		$ 31,360.28

Bills Receivable and Outstanding Accounts of Schedule.

Only those that were good and collectible are listed here.

Schedule B-2. July 29, 1916.

Notes:

Gust Swanson .... $ 157.46

Schedule B-3.

Open Accounts:

J. F. Cox	$ 3,000.00
Rutledge Timber Co.	2,862.55
Freight claims	300.00
Harrison Box Co.	428.56

Hogan & West		175.00	
R. F. Kerchival		48.35	
S. I. Ry. Co.		37.44	
W. O. Eichelberger		2.01	
Clarence Schock		137.06	
Atlas Tie Co.		1,934.96	
Balance Assigned Accts.	$10,511.04		
Less	2,500.00	8,011.04	
(Deductions from customers, also discount and interest.)			
Insurance policy		685.25	
Deposit, Fort Dearborn		20,871.45	
Deposit, Winona		25.79	
Total			38,519.46
Schedule B-4:			
Gov't Timber Refund			9,932.80
Total			48,609.72

Reduction in Assets Between February 1st, 1916, and July 29th, 1916.

Stumpage:

A: Timber Cut from Our Lands and Worked Up by Us.

2,215,012 ft. white pine, $4.00	$8,860.05	
3,572,760 ft. yellow pine, $1.00	3,572.76	
915,550 ft. mixed timber, 50c.	457.78	
Total		$12,890.59

B: Timber Cut From Our Lands and Sold.

About 1,000,000 ft. mixed timber, 50c.	500.00

Logs:

A: On February 1st, we had on the banks of rivers, ready to be driven and delivered as follows: (Market price less cost of delivery, $1.50 per M.)

Item		
4,874,833' white pine, $11.50	$56,060.55	
257,330' yellow pine, $6.50	1,672.64	
671,696' mixed timber, $5.50	3,694.32	
Total		$61,427.51
B: Logs sold about 500,000 ft. mixed timber, $5.50		2,750.00
Sundries:		
Sale of Ramsdell dock		3,000.00
Total		$80,568.10

Addition to assets between Feb. 1st, 1916, and July 29th, 1916. Which assets were still on hand July 29th, 1916. (Prices are those of appraisers.)

Item		
Commissary supplies		$ 525.86
Dynamite		609.50
Horses and harnesses		7,750.00
Oats		375.00
Kitchen equipment		75.00
Logging Equipment:		
Jammer	$ 600.00	
Pipes	540.75	
Big wheels	1,000.00	
Oil tanks	200.00	
Camp equipment	1,352.35	
Tools	557.85	
Sundries	147.97	4,399.92

Logs, purchased and on hand yet:
807600′ Yellow Pine...... 8.00 646.08
Logs, in mill pond, on hand Feb. 1st, in woods, expenses of delivery:
24200 @ $2.50 per M.............. 605.00
Logs, in woods, cut from our lands, labor performed on them:
259000′ @ $6.00 per M.......... 1,554.00

Total $16,540.37
Lumber on hand Feb. 1st, 1916 4,612,000 ft.
Lumber on hand July 29th, 1916 5,864,000 ft.

Gain ....1,252,000 ft.
1,252,000 ft. @ $15.00 per M (average cost price)................ 18,720.00
Lath on hand Feb. 1st, 1916....1,844,000 pcs.
Lath on hand July 29th, 1916....1,978,000 pcs.

Gain .... 134,000 pcs.
134,000 pcs. @ 1.25.................... 167.50

Total Gain............................. $18,887.50

Mr. Post: Exception.

The Witness:

The only reason that I did not see it, the claim of I. F. Searle for $55,000 in liabilities, was because the Stack-Gibbs Lumber Company was only a guarantor of that particular indebtedness, but of course it was an indebtedness. (394) The Stack-Gibbs was guaranteeing the notes which the Dryad

Lumber Company had given upon a separate document that I haven't got here. That paper Mr. Searle must hold, I have never seen it. I see from the claim that they filed in the estate that the Stack-Gibbs are only guarantor.

Q. I understand that you stated a minute ago the reason why you left Searle out of the Stack-Gibbs statement was because the Stack-Gibbs was only a guarantor; that information you didn't get from the books and account but from a statement here in court?

A. That is correct. (395)

The Witness:

And that is true with reference to Mr. Stack and Mr. Hess. I knew at the time I made up the statement that Mr. Searle, Mr. Stack and Mr. Hess had signed the trust deed as one of the creditors of the Lumber Company. In making a comparison of this statement, I didn't have any other statement before me. (396) I have here the bills payable book and I find the Yeomans account on the book. (400) I am looking at Mr. Yeoman's claim here, simply for the reason that it gives me the date and enables me to find it quicker. These are the original notes for $19,500. They were supposed to be secured through lumber which was stacked in the yard but there is a controversy about that. I found some written agreement with Yeomans or his company about lumber. A copy of the agreement is attached to their claim. That agreement was made in January, 1914, (401) and under that agreement the Yeo-

mans account was to be secured by lumber. That was the situation as it existed on February 1st and has existed in that situation ever since I assume with the exception that lumber was substituted. Lumber on hand February 1st as security was not on hand July 29th, but a different amount of lumber was marked. After I came here, I used up some of that Yeomans lumber and sold it. The next item, the Exchange National Bank $21,000, that item is made up of the $6,000 they signed for on the trust deed and the $15,000 notes that Mr. Coman and I have both testified that were marked cancelled some time or another.

Mr. Adams: While Mr. Katz is making his figures, your Honor will recall we asked Mr. Coman to produce the receipt which he received from Post, Russell, Carey & Higgins for the notes which are set forth in the Mechanics petition. The receipt has been furnished, a copy, which we have agreed (402) to treat as the original and we offer it in evidence as respondent's exhibit No. 5.

The Referee: It may be properly marked and admitted.

Said receipt admitted in evidence and marked Respondent's Exhibit No. 5.

The Witness: The third item, Merrill Cox & Company, $221,370.00. There were $182,000 in notes, and at that time there was an open account of $32,500, totalling $214,500, so it was less than on February 1st; I see from the books here that Merrill Cox & Company made new loans in January,

1916. On January 1st, the notes of Merrill Cox & Company amounted to $182,000 and on January 1st, 1916, an open account of $32,500. (403) That makes the total indebtedness of $214,580 on January 1st and more money was borrowed between that time and February 1st. January 7th it increased the money on open account and gave notes for it. The account of the Idaho Timber Company, Minnie A. Gibbs and Fort Dearborn National Bank, were the same as they signed the trust deed I think. The next item is Lumbermen's State Bank, $2,500 that is the bank at St. Maries which I paid. There was no security and the item of James McInnis for $500 is a supply note. Mr. McInnis is a logging contractor but the note was not secured. The next item is D. H. Dollar Logging Company, $5,602.49. Yes, those are all notes. These were notes which were given by the Stack-Gibbs to supply people who had furnished the Dollar Logging Company with logging supplies, and inasmuch as we owed the Dollar Logging Company money we gave those supply companies notes and charged it to the Dollar Logging Company. Those notes have all been paid. (405) There were notes issued to Stanton and Powell-Sanders and Interstate Rubber Company and some other concerns, and the amount was $1000 due May 17th. They were issued on January 19, all of them on the same date, 1916, $838.48 due April 18th, $1000 due May 19th. They were the same, D. H. Dollar Logging Company, $875.00 April 12th, $1389.09 March 30th, $500 on February 28th,—all

in 1916. Under the logging contractors I remember an open account D. H. Dollar Logging Company on page 1. D. H. Dollar Logging Company and D. H. Dollar are the same thing. On February 1st, it shows an open account of $3091.03. I think Dollar will appear there once more in showing under the heading not shown on (406) the books. We had several contracts running with D. H. Dollar Logging Company on which the balances were due and they didn't show on the books those contracts hadn't been quite completed yet but the fact was it was due Dollar only at this time, and if they didn't show under D H. Dollar they ought to have shown under due logging contractors. The reason they gave me was they didn't want to put it on Dollar's account so he couldn't ask for the money. The item, D. H. Dollar $14,856.14 is in my exhibit under the heading of "liabilities not shown on books February 1st, but now appears on the books." I put it on there, in the course of the business I found it out. That is the balance due on logging contractors and there is no litigation about it. It is litigation only that they didn't get the money; at least I have never seen the complaint that Mr. Dollar made. (407) Between February 1st and July 29th, we paid Dollar quite a little money. We credited D. H. Dollar Logging Company between February 1st and July 29th for balances approximately $12,000—I mean $22,000. That is for a balance on Logging contracts. The work was done, we were supposed to take up the logs on skids or

on the banks of the river and credit them with the amount, but we credited him only with part of it. (408) (The witness here outlined the litigation existing between the Dollar Logging Company and the Stack-Gibbs Lumber Company with reference to their claim.) (410) Mr. Whitla stated that the trustee claimed that the account had been paid except $3,000. The item of Greer Fuel & Ice Company, $1,678.45, was a note with no security. (412) That has been paid. It was paid after February 1st. $1,000 I remember was paid before I came, and $658.45 I paid. The next item, the Coeur d'Alene Exchange National Bank, $5,000 was not secured. It has been paid about April 27th, 1916. Shoshone Timber Company, $5,000 has not been paid. I think they claimed preference on account of some timber—something like that. (413) I remember having seen a contract of some sort with them to secure it.

Mr. Danson: It was a sale of timber and they reserved a lien upon the timber.

The next statement is Dan Bell, $600. That has not been paid. The next is the Central Warehouse Company. I think it was $11,592 on January 1st. (414) —$11, 592.83. $25,000 more they borrowed, but we paid some back by the time that February statement was made. This money was advanced on Lumber purchased and we had a note for it and the Central Warehouse Company had a contract whereby these advancements were to be paid in certain lumber. I am positive a note was given, I

saw the notes I think, I mean I saw the note in the claim they put in. I know when I came, it wasn't on the books in that form, and I had it put on the books as a note because it was a note; it appears on the customer's ledger That is the Central Warehouse Company account that is mentioned in the trust deed. The next item is the Loonan Lumber Company for $4,239.98, an advance on lumber, that is the same kind of an account as the Central Warehouse Company. The next item is Rodgers Lumber Company $1800 and that was an advance of lumber like the Central Warehouse; and the same is true about the Salzer Lumber Company $4,280. Notes were given in each of those instances. I think they have been paid except that we owe the Loonan Lumber Company about $500, otherwise they have been paid in lumber. (416) I paid them in lumber after I came here. I also paid some of the Central Warehouse Company's claim with lumber, about three or four thousand dollars. The next item is the Bardwell-Robinson Company $3,681.40 for lumber advancements. I think a small part of that was paid with lumber and the rest paid back in cash. That was paid before I got here. The next item, the Lambert Lumber Company, was an advance on lumber, that was paid back also in cash before I came. That come out in those proceedings in which (417) the expenditures were mentioned between February 1st and February 10th; it must have been around February 10th or 11th. February 12th, it was paid, Lam-

bert and Bardwell-Robinson both. As to the Empire Lumber Company, part of it was paid and part not paid. That was a different contract. The Empire Lumber Company gave promissory notes, I mean notes in favor of the Stack-Gibbs Lumber Company so that the Stack-Gibbs Lumber Company was able to resell those notes and they got as security, lumber. The Empire Lumber Company gave its promissory notes to the Stack-Gibbs and the Stack-Gibbs gave lumber to it as security therefor so that the $9000 item was secured by lumber and paid, part of it has been paid and part not. It has all been paid except $3500. (418) That is partly after I came and before I came in lumber. The next item is logging contractors, Atlas Tie Company, $14,228.85. That is an open account and was carried on the books as an open account. It has been paid through the sale of logs. There was a contract with them, I don't know whether the account was secured or not. The contract was that they should advance the money and be repaid in logs. The account of A. J. Callis, $2904.87, was simply money owing for logging contract, that man sold us logs and we owed him money. (420) That is not all paid but what was paid was in cash. There was some kind of a contract, we bought logs from him. He is in the same boat with the D. H. Dollar Logging Company and there is some controversy over this item of $2,904.87. He got some money and there was more coming to him and according to our books what is coming to him now is only a

few hundred dollars, and he claims a few hundred dollars more, and there is a dispute, but it does not amount to much. The next item is Campbell $327.70. I think that has been paid during my administration. The next item is D. H. Dollar, $3,091.03, that I referred to a little while ago. The next item is only $63.00 and the next one, Hemingway $1730.69 which is for logs that were bought outright from him and paid for in cash. (422) Since the time that I came here on February 16th, I signed checks to Hemmingway for this amount together with other proper signature and now getting down to J. A. Thornton here, $24,982.15, that was a logging contractor from whom we bought logs or rather he worked up our own timber into logs and we paid him for doing it. He got cash for it or we paid him cash in notes. We owe him quite a little money yet, rather it has been paid now under the bankruptcy proceedings as a preferred claim under a labor lien. (423) On July 29th, we still owed him money to the extent of about eight or nine thousand dollars. I do not know exactly the amount. Between February 1st and July 29th the Stack-Gibbs paid him in either cash or notes or paid material for him—paid to his creditors. Mr. Thornton had no security for the $24,000 except the statutory lien that he filed later on. Now the account of J. C. White $572 is the same way, that has not been paid yet. On the next page there are several items of salary amounting to $3700. Those showed on the books (424) salaries

owing to employes of the Stack-Gibbs Lumber Company that hadn't been paid for two months and that was due on February 1st. Down below is the overdraft the Exchange National Bank, of Coeur d'Alene which is an overdraft for this amount you have here $15,431 on February 1st. The bank had no security; not that I know of not any security known to me when I came. That overdraft was there according to the books of the Stack-Gibbs Lumber Company. I do not think it was put into a note, I think it was eventually paid in cold cash. On the next day, February 2nd (425) there was an overdraft, the same, about $15,000. It was picked up already on the second—I want to take this back, I got into the wrong column—on the —— of February, 1916, the overdraft was $12,500; on the 3rd the overdraft was $10,000, on the 4th overdraft was about $9,000; on the 5th about $8,000; on the 7th about the same; on the 8th still the same; on the 9th it was about $6,000; on the 10th about $7,000; on the 11th $6,000; on the 12th $6,000; on the 14th about $5,000; on the 15th about $4,000; on the 17th about $1,000; 18th it went up to $2,000 again and so on; on the 19th it was $2,000 again; 21st was closed out and the overdraft paid. Those overdrafts were paid by cash, checks on other banks. I understand before I came they did considerable business with the Exchange National Bank of Coeur d'Alene. (425) I do not know whether the bank here had any security or not. This item of the Coeur d'Alene Log Owners Association, J. A.

D'Aoust, I do not know any more what it was or who it was. I do not know whether I paid it or not, I think it was paid before I came. The St. Joe Boom Company, we still owe them money and there was no security over it. They claim a lien against those same logs that we were talking about, those Dollar logs. We agree at the amount; the amount has been increased considerably since and there is no controversy at all. Mrs. Tolerton, I think she signed for about $20,000. There is a controversy of about six thousand dollars. Voorhees & Canfield, $1586, there is no controversy about that that I know of. (427) They have not been paid. I do not know anything about the Coeur d'Alene Grain and Milling Company, $311. I think it was paid. As to security, all those here that are mentioned that are mostly repair people and supply people and things like those, and little accounts there was no security, they simply sold us merchandise. The Kootenai County State Bank, $468.00 was an insurance account, they had no security. The Lumbermen's Publishing Company was for an advertisement. McCrea & Merryweather $610 was for insurance. Marshall-Wells Hardware Company $113.17, that is for some kind of material. (428) Mechanics Loan & Trust Company $586.21, that was for insurance and to get down to the White Pine Sash Company, $293.68, that was not secured. E. R. Whitla $8105, he got the money.

Q. Under liabilities not on the books, you put down here a lot of things not on the books?

A. Yes.

Q. Back Taxes?

A. That is correct. They paid only half the taxes in January according to their option, but they didn't put the other half on the books as owing. Here is unpaid taxes (showing the ledger) I opened an account, unpaid taxes, March 31st. I mean I tcld the bookkeeper to open it and write it down; I wasn't keeping the books. The next item, Chicago, Milwaukee & St. Paul, material $1139.08, that account was over two years old. (429) That account was not on the books. I opened it up on April 12th, 1916, that is I had the bookkeeper do it. The railroad collector came in and wanted the money and I told him there was nothing on the books and they sent me an itemized statement and I had it checked up as well as I could and then I put it on the books. That has not been paid nor has the railroad been secured. The next item, Chicag,o Milwaukee & St. Paul, Tyson Creek, $3352.79, I haven't got that here today, I can bring it tomorrow and show it to you. The question on the item of disputed taxes $2592.69, I haven't put this on the books yet. I have put them down here because they also appear on the schedule and I had to show them on both sides. (430) They are disputed taxes. The company does not owe them. There was a tax dating back to the year 1910, 1911 and 1912, a disputed Federal tax, it is an income tax. I did not pay it. The item of the Mutual Life Insurance Company loan $3,767 (431). The

Stack-Gibbs insured its president, Mr. Gibbs, for I believe $100,000 and after the premium had been paid they borrowed cash value and hypothecated the policy. I do not remember when I put that on the books. I put it on the books—it must have been between March 23rd and March 28th. The entry is in the handwriting of the bookkeeper placed there at my instructions. The money was borrowed on November 16th, 1915. I do not know how I found out about it, I found out a whole lot of things by looking into them. The next item is the mortgage on the Spokane property $2666.77. That is a mortgage on property which the Stack-Gibbs Lumber Company owned in Spokane together with another party. The Stack-Gibbs Lumber Company built some houses in Spokane and then when they needed the money they borrowed on it. (432) The Washington Trust Company or something like that holds the mortgage. The note was signed by the Stack-Gibbs Lumber Company. That did not appear on the books when I came here and I don't think that I put it on. I don't think it is on the books yet. Now to get down to the balance due for logging contractors, Callis so much, Dollar so much, Hemmingway so much, they are disputed items, in so far as the people claim still more. I want to correct it this way, they claim still more than the books show on July 29th. That is our account on February 1st. It has taken changes back and forth since, and the dispute is not for the amount at that time because we didn't know what we had on the

books at that time, but the dispute is about the amount owing them now. The Callis item was not on my books February 1st. In April we put on $1233.03 (433) but the date is left out here. On July 29th, when we brought the books up to date, they told me that they had held back ten per cent for a certain amount owing to them on account of some kind of controversy to which he was entitled and they put it on the books. Before April, Mr. Callis had an account on the books which showed the other account that I have on page one of the exhibit here, which is the same as exhibit 3, $1851.50; and in April, I added to that account. The amount added is $1485.15 in April and July 29th. In April it was $1233.03 and in July $248.12. The dispute over those items we have with him is about (434) a certain scale which we made since, and for which we charged him that he does not concede it. The only controversy is there, is about $100 to $150. Two items that you point out, $1200 and $200 as to whether they are old notes, how they didn't get on the books, the reason is the following: A concern that wants to keep their books straight and know how they stand at all times, if they hold back an amount which they owe a customer for a balance on a contract or anything like that, they ought to open up an account just like I showed you unpaid taxes or unpaid freight and show at any time at the end of the month how they stood. but they had a habit of putting things in the books only when they were ready to pay them, or the men asked for

them. They were put on the books when we paid them or when I found it out. It happened all the time, somebody came in and asked for money and I had to ask for a statement first. (435)

WHEREUPON an adjournment was taken until February 21st, 10:00 A. M.

(The cross-examination of Siegmund Katz by Mr. Post was resumed.)

Now as to the accounts that were secured, the first item is the Yeomans item and the next one is the Shoshone Timber Company $5000. All those are for lumber advances, I do not know if you can call them security because there was no special lumber purchased for them. (436) There was a contract —Central, Loonan, Bardwell, Lambert, Empire Lumber Company—there was a contract of lumber shipment. Atlas Tie Company was a similar contract. There were logs to be sold to them. I do not think there are any more. Thornton's name is on there. There is nothing else as to secured contracts on page 2 or three except the liabilities not shown on the books, Mutual Life Insurance Company. The two items which appear here are $3767.64 and $2666.67. (437) We made up this statement from schedule instead of the books. The Yeomans Lumber is the same in the schedule as in the book schedule A 2, page 1. I put it down making my figures $19,500. (438) The interest was paid until July 1st, I believe, I didn't consider the interest on February 1st nor on July. I paid some interest on that after I came here. That is

something we paid $378.61 on March 20th but paid nothing after that. The next item that I have on my Exhibit 3 is Exchange National Bank $21,000 and I have on my schedule of July 29th $6000. That is the note that was renewed and we paid interest on it at the rate of six per cent, $120. On April 4th we paid $60 and on July 13th. The next item is Merrill Cox & Company $221,000; I have that on my schedule for July 29th in the same amount. (439) We paid Merrill Cox interest in two ways, one was in the beginning cash payment, and later on we stopped paying interest on all the notes and then we gave them demand notes for the interest. We paid in cash about $3200. We made these payments at different times. Taking up the item of $692,000 plus, as the liabilities on July 29th, I have not figured any expense whatsoever, interest or anything else but the amount there includes interest which we owed Merrill Cox & Company. The total that I put in my schedule was $225,345.-92. (440) The next item, the Idaho Timber Company, that item at $60,000 in the schedule for July 29th but the Idaho Timber Company appears in the schedule for a higher amount because the interest has been computed. In making up my total amount of liabilities, the Idaho Timber Company is mentioned at $60,993.77. It is $60,000 on page A3-2 and $993.77 on page A3-6, and in my grand total I put the Idaho Timber Company in at $60,993.77. We paid the Idaho Timber Company some interest, (441) about $200. In my grand total, I have Mrs.

Gibbs for $12,725, paid $248.69 interest. We have in the compilation for July 29th, I have the Fort Dearborn National Bank for $107,000 and we paid interest of $1,055.33. These were paid for, all the renewals up to March, about the middle of March; from then on we didn't pay them any interest. We owe them interest in addition to the schedule. I am referring to 1916. The next item is the Lumbermen's State Bank, $2500. That is not in the grand total for July 29th, that was paid. $1500 was paid on April 22nd, and $1000 was paid on March 31st, 1916. (442) The payment was made, it included a certain amount for interest, $20.00 March 31st and $30 on April 24th. The next item is James McInnis $500, that was paid on March 1st. The amount of interest on that does not show here. The item of D. H. Dollar Company $5602.49, that was paid at different times. It does not show in the grand total. The amount of interest on that item was paid, $203.69. The next item, First National Bank of Lincoln, $12,500, that is included in my schedule of July 29th but it appears under the name of I. F. Searle, because that was evidently transferred from the First National Bank of Lincoln to I. F. Searle, and it is $12,689.58; $12,500 for notes, and $189.58 interest which was due. That is the way I figured it in making that total that I have in exhibit 4. (443) I think there was some interest paid after I came here, on that, $112.91. The next item is J. A. Thornton $1551.45, that was not paid. The next item is the Greerer

Fuel & Ice Company, $1678.45, that is included in the grand total of July 29th—no I misunderstood you, that has also been paid together with interest of $17.50. The next is the Coeur d'Alene Exchange National Bank, $5,000 (444) that has been paid with interest, $166.67. The next, the Shoshone Timber Company, $5000,—that has not been paid. It was included in my statement of July 29th but in that sum. There was no interest paid on the Shoshone Timber Company. The account of Dan Bell has been increased to $700 and we owe him some money on open accounts. The total amount I understand is $1134.60 and I think we paid some interest on it. (445) The Central Warehouse Lumber Company is in this account, $25,294.01. There was no interest paid on this but between February 1st, and July 29th there was paid $7,653.-59. The next item is the Loonan Lumber Company, that was put into the statement only for $493.84. The difference was paid but no interest. Rodgers Lumber Company, that does not appear. It was paid in full. The Salzer Lumber Company was paid in full and no interest paid. (446) Bardwell-Robinson Company was paid in full, no interest. Lampert Lumber Company the same way; Empire Lumber Company was partly paid, the schedule was $3500. There was $81.67 interest. The next item here is the Atlas Tie Company, that does not appear under the liabilities and I did not include that. That has been paid. I do not think there was any interest paid on it. John

Carter does not appear any more. That has been paid. (447) A. J. Callis, that appears under the amount of $126.63. The difference was paid, no interest. The next is A. S. Campbell, that was paid. The next item is D. H. Dollar $3,091 but that appears as $8,280.38. We did some business with them after February 1st, quite a number of it wasn't on the books as it ought to have been you will see, some of those logging contractors appear again not on the books. We paid him money in the meantime, I would say about $10,000 but no interest. The next is Mrs. Dawson, that is included but we do not owe that amount. The next is Hemmingway that appears on the books as $213.16. The difference was paid between February 1st and July 29th. (448) The next is Hopkins which was paid. The next is Papesh which was also paid and the next item is Thornton that appears on the books as $6,997.16. I mean I included this amount in the list which you have before you as the liability of July 29th, 1916, as $6.997.16. The difference had been paid but no interest was paid. The next item is J. C. White, we still owe him that amount. We have paid no interest. Now these items of back salaries, $3,698.12, they have all been paid. Those names appear again in my statement of July 29th; of course we owed them salary for the month of July.

(Here the witness outlined the names of those employes. (450)

Now the item of the Exchange National Bank,

Coeur d'Alene, has been paid in full and does not appear as a creditor. The St. Joe Boom Company, $2,286.53, Mrs. Tolerton, $11,071.60, the difference has been paid there. Voorhees & Canfield, $1588.3. Chapin Company is paid in full. The American Trust Company has been paid. I want to correct here something, the Exchange National Bank, Coeur d'Alene, was included in July 29th, 1916, to the extent of $2,032.91 for having time checks in their possession which were unpaid as of July 29th. (451) Now that amount has been paid by the receiver as a preferred claim. The Commercial Printing Company is included, $140.10. Coeur d'Alene Grain & Milling Company, $404.16. (Here the witness detailed an itemized list of various small creditors.) (453) (459)

The Witness: From now on always when I mean the schedule, I mean the bankruptcy schedule, and I am going to say from now on the exhibit when I mean the exhibits. I have not included in the exhibits $8500 which is mentioned in the schedule. The following, I have included in the exhibit which I mentioned. (Here the witness detailed various amounts.) (459) (477)

Q. You haven't given me the notes of the Mechanics Loan & Trust Company.

A. I mentioned them.

Q. To make the $692,000, you put them in in what amount?

A. $100,000.

Whereupon an adjournment was taken until February 21st, 1917, at 1:30 P. M.

CROSS-EXAMINATION RESUMED.

By Mr. Post:

On July 9th, we had an over-balance, Fort Dearborn National Bank, of $10,588.63, which was the balance according to our books. (464) During the whole month, this is the closing entry up to the 29th of July. On July 28th, there was a balance of $6,706.09. On July 29th we had in the Exchange National Bank of Spokane, $584.25, Winona Bank, $25.79. (465) Now with reference to the liabilities that are mentioned here as not on the books, all those I mentioned—there were some more outside of those I mentioned, smaller bills that came in which were dated before February 1st and which were paid during this time which I can't find any more. Say, for instance, somebody came in in April and said, "Here you owe me some money," and showed a bill for four or five hundred dollars, and I would look this bill over and check (466) it up, and if it was correct—and it was correct, and when I said why wasn't it on the books, it would be forgotten or overlooked or mislaid and according to the system they usually only put things on the books when they were ready to pay them, but there were so many of them I couldn't remember. At these times, I would put them on both sides, the debit side and the credit side when I paid it.

Q. Of $636,519.35 that were not on the books on February 1st?

A. Those that are entered $636,519.75 were on the books already with the exception of—no, no ex-

ception; they were all as per the books February 1st and I see in addition to this there were some small bills and other items which were paid and yet the liabilities dated back to February 1st or before of which I could not keep track now any more; some of them have kept an open account all along, like those here, he could find those but others were charged to expense, and it was not an account—it was not an open account and it is impossible for me to get them out unless I must sit down for two months and look over every voucher and check up everything, check up every invoice. (467) It is possible, in my statement of liabilities not on the books February 1st, that I haven't all the items but I am pretty sure that I have not. I put nothing done there that I was not positive about and whenever I paid any, I put them down. Of course, when they were paid, I had to put down the name of the party and give him credit and then charge him with the payment. That must be done where a party has an open account, but where we buy from a man only once here they buy some hay from him for instance, we simply charge it to livery expense, and pay it out in cash without that man's name ever appearing on the books except in the voucher. I couldn't tell you exactly how the $100,000 was paid out, because you know what I told you at the time but that which does not appear on the list here does not amount to very much. (468)

Q. Now you have just told us a few minutes ago about according to your books, there being a credit

at the Fort Dearborn National Bank of something over $11,000 on July 29th, and a few hundred dollars at the Exchange Bank in Spokane, and a few dollars at the Winona Bank; are those accounts put in that way in your exhibit 4 in which you put down the assets as of July 29th?

A. No, they appear in this way, all the amounts appear eventually that way; I wish to explain that that schedule—that I made up this exhibit 4, I believe it is from the schedule; the schedule shows exactly the same amount of liability as the books show, but very often in a different form.

Q. I am not asking about the liabilities, I am asking about the assets now?

A. Assets the same way; we have paid out quite —we have paid off quite a number of accounts by giving them checks on the Fort Dearborn National Bank, and those checks were charged to the Fort Dearborn National Bank so that according to our books, at the end of July, there was a balance of about $10,000 as I told you, then some of those checks came back and the people who had received those checks were added to the creditors of the Stack-Gibbs; consequently they appear in the schedule as one of those creditors and most of which I mentioned to you just before noon, and then you will find the deposit of the Fort Dearborn National Bank was increased accordingly because those checks were not paid.

The Witness:

With reference to the deposits, Exchange National

Bank, $15,431.09, that is a mistake, it should be $15,111.98. That overdraft, the Exchange National Bank of Coeur d'Alene was confused with it. The books here show that they were checked with the statements which came from the Exchange National Bank. The Exchange National Bank balance will not correspond with my statement here. The Fort Dearborn National of February 1st, $14.26 (470) and the First National Bank of Winona $238.38, the First National Bank of Lincoln $9,558.26. Those are the only banks that we were doing business with, February 1st except with Coeur d'Alene, but there was an overdraft there. On page 6 of exhibit 4, it says accounts of schedule, that means July 29th, 1916. While in bills receivable of date February 1st, 1916, I put down in the bank as shown on the books of the Stack-Gibbs Lumber Company as of that date when I came to July 29th, 1916, I did not do that. I put down there, deposits Fort Dearborn National Bank $20,871.45 (471). The balance according to our books was $10,588.63 and the difference between those two amounts is made up by checks drawn against the Fort Dearborn National Bank, and charged against them which were returned, and the original holders of the checks had been credited for those amounts, not on the books, because we did not care to change the books, but it was done on the schedule. They threw out those checks. I haven't a list of them any more and it does not show on the books but I told you it shows on the schedule. The schedule is made up from

the books and other papers because I made it up from a list of the checks that we got back. I do not think that I have that list now (472) nor have I all of the checks because some of them kept them to make their claims on. I can get the stub check book; I can get it by referring to the statement of the Fort Dearborn National Bank and seeing what checks are outstanding, but I haven't got it here now. I know the checks that were drawn and which were not paid, that is the only way I can check it up if I had the statement here, in fact, I think the statement is of record. (473) I think the statement of the Fort Dearborn National Bank is on record here. I can take the cancelled checks that came back from the Fort Dearborn and compare it with our books (473) and get it that way, but even then I have to go back to the office and get the books — before we made the schedule, we proved every account.

(The witness examining the schedule) This claim does not show it; it shows a different balance, about $26,000—$26,690.80. The difference in the two amounts appears. On page 6 of exhibit 4, you will find an account balance of assigned account $10,511.04, less deductions from customers discount and interest $2500, leaving $8,011.04. This shows on the books under contingent bills payable. (474) This $10,511 is made out of about 250 amounts; we sold invoices to the Exchange National Bank and the Fort Dearborn National Bank, and some other banks, and drew on them for ninety per

cent of the face value of those invoices, and then when the bank collected the entire amount of that invoice they credit us with it, with the rest of the ten per cent of the invoice, less deduction for interest and discount, and deduction which the customers might have made against the invoice, so I had to check out in each special invoice the amount of the invoice, the bank's advance, and the balance due; in this way I got this amount of $10,511; now in our books you will find in the customers' ledger that each one of those men has an account, and then again I have a bills payable contingent account which is—we are responsible to the bank for this account, even if we sold it to them, and therefore it was a liability. Now the liability between this responsibility of ours and the amount which was advanced to us constitutes the balance which I have mentioned here; I have accumulated it in the schedule but to find it out in the books now means about a week's work. (475) This balance of $10,511.04 is nearly $6,000 of the Fort Dearborn National Bank, the rest is made up by the Exchange Bank. The $2500 I subtract is for deductions. The bank in advancing us the money does not charge us the interest—they charge us the interest and they collect in from our customer because they do not know when they get the money from their customer; they give us $500 on an invoice and a month from now or two months they collect $550, and then they figure out the exact amount of the charges and besides we do not know what the customer may de-

duct from this invoice or he takes advantage of the cash discount. We did not consider the freight. This $2500 is an estimate which has been proven by what actually happened because I only made the statement now and it is past history. Of course I could show what the deductions were if I take the time. The matter is closed insofar as I haven't tried the exact statement of all deductions of either the Fort Dearborn National Bank or the Exchange National Bank. (476) There are a few uncollected items, but pretty nearly I know it will amount to about $2500. Now with reference to page 5 of exhibit 4, on February 1st, I wrote here only those that are mentioned which are good and collectible. All others on the books were no good; you see I made up this statement with the viewpoint as mentioned by you and Mr. Adams to see how much money was lost or made and for no other reason; I didn't put on the books those that were on the books for a certain purpose but only those that were actually good. No other bills receivable existed February 1st, 1916, have been paid. The other accounts show on my books. They have all been paid with the exception of $3000, J. F. Cox, that is the $3000 which is deposited with the Exchange Bank in escrow. (477) Now referring to July 29th with reference to the government timber contract, the $10,000 I think was paid. On February 1st, I do not know, the Stack-Gibbs had some sort of an arrangement, by which they made a bid and deposited money with the government for a lot

of timber. They have done that frequently, I am sure, but not on February 1st, or between February 1st and up to this time. (478) There was no money on deposit with the government on February 1st. This $9,932.80, that has been something that has been received since the bankruptcy proceedings were commenced. We kept it on our books as an outstanding account under the name of government timber and under the receivership it was collected. On page 7, the first heading stumpage, timber cut from our land and worked up by us, that was cut between February 1st and July 29th. That quantity of white pine shows on our books in our log book, but I do not think I have it here. It also means again this is an accumulation, I added up from every day from logs brought in which we cut during the period, that is the accumulation of those additions; I have with me here the sheets where I entered it up under the different dates, I believe. I took it from the books and I will produce the sheets from which I took it. I am showing you now the recapitulation of all white pine, yellow pine, (479) showing you the sheet that I figured it on. According to that sheet, there was 2,215,012 feet of white pine, 3,572,760 feet yellow pine, 915,550 feet— The white pine came mostly from a piece of timber along the right-of-way of the Tyson Creek Railway Company. It is land owned by the State, and which the Stack-Gibbs bought. It all came from lands of the Stack-Gibbs Lumber and in order to reach this timber, we had

to build a logging railroad. It was all railroad timber, not on the water, I mean we railroaded it right into the yard. We built the railroad right into the timber and in one instance it was two miles and in another instance it was five miles. (480) The freight on the railroad, the Chicago, Milwaukee & St. Paul, was $2.15 a thousand and we put it down here at $4.00 stumpage—we paid $6.50 a thousand for cutting it and $2.15 to bring it in, for freight. To go over it again, I figured $6.50 cost us to log it, $2.15 for railroading, that is $8.15; figuring about thirty-five cents for incidentals and overhead expenses, unloading, that is about $8.50 and $4.00 for stumpage is $12.50; now for a concern that has its own stumpage, cuts its own timber and brings it to the mill it shouldn't cost them more than $12.50 for white pine. (481) I figure that white pine under such circumstances isn't worth more than $4.00 a thousand. I paid $6.50 for logging it, that includes the cutting down of the tree to the time, to the point where it is delivered on cars to the main line. Part of this work we did by contract and part of it we did ourselves. The work on the Tyson Creek Railroad was done by contract and that is all included in the contract price; in other words the contractor has to cut down the tree, cut it into logs, bring it to the Tyson Creek Railroad, and load it on the Tyson Creek, with his own engine, deliver it on the main line of the Milwaukee. In order to get part of this white pine, we built the Tyson Creek Railroad, about two miles,

I believe, I do not know exactly any more. (482) That building was started two years ago; they got altogether about thirty or forty million feet of timber and that was just when I came here the last few million feet were cut. As far as I was concerned, I spent nothing on the Tyson Creek Railway, not a cent, because the railroad was kept up by the logging contractors, if anything at all we made money on it because we charged other lumber concerns thirty-five cents a thousand feet for bringing it over the railway. On the Tyson Creek Railroad, the Stack-Gibbs people advanced about $23,-000. The amount of money that the railroad cost then including the upkeep or things there was up to that ·time. When I came here, there was not more than 2,000,000 feet that belonged to the Stack-Giibbs that could be hauled to that railroad. (484) If I made any kind of a mistake in material matter, it was in relation to the Clarkia Railroad.

Q. Or if you are guilty of any bad judgment about anything, it was in relation to the Clarkia Railroad?

A. All right, without prejudice to later defense, I admit it. Now as to the amount of timber that the Stack-Gibbs people hauled over the Tyson Railway, I cannot tell you the exact figures because I haven't the records here, but my understanding is it was in the neighborhood of thirty or forty million feet, but I believe that (486) Mr. Armstrong can give you almost the exact figures because he had charge of that work. The Tyson Creek Railway

has been sold to a man by the name of William Logan for about $1000 which I think was $1000 too much. (487) After the timber was cut, the railroad was of no value to us. I wouldn't have sold it in the ordinary course of business we might have got money out of it because maybe there is another fifty million feet of logs will go over that railway and will make it a profitable railway, but the railroad was in an awfully bad state of affairs because the contractor who had charge of it neglected it and it would have cost five or ten thousand dollars to put it in decent shape again and it is up to the parties who want to use it now to do that. In getting my value of $4.00 stumpage, I did not allow anything for charging off the Tyson Creek Railway. On your theory that if the Tyson Creek Railway costs $24,000 and it served 24,000,000 feet, then that would cost for every thousand feet of timber sold, $1.00. (488) As you say, if I start with the value of the white pine logs in the millpond at $12.50, I just subtract at least $1.00 to retire the capital account of the logging road, $6.50 for logs, cost of logging, $2.15 cost of paying the Milwaukee Railroad, and 35 cents for incidentals but I would not allow $1.00 a thousand in this instance on that stumpage, for two reasons;—first of all that railroad should never have cost that much money; it is an old track and I have looked into the matter several times and Mr. Armstrong can also testify to that, that that railroad ought never practically cost anything, the Milwau-

kee contributed $10,000 to that railway, building the bridges, and giving $10,000 to the cost of that railway and there wasn't only an additional two miles built by us and it should never have cost more than four or five thousand dollars, and that railroad ought to have been a paying proposition instead of an expense, because an enormous amount of timber (489) outside of our own came over this road and he collected 35 cents a thousand for every thousand feet that went over that road, and this is simply a case of mismanagement and negligence; that stumpage there on that part of the town that is easily accessible is any time worth $4.00 a thousand, if not more. I recommended the sale of the road for $1000 because it was an unusual circumstance that we were able to get $1000, the reason is as I told you, the railroad was in very bad shape and would have cost us quite a number of thousands, at one time one party wanted five thousand dollars to put this railroad in shape again and there was a condemnation suit about that railroad and some other lumber companies are anxious to have it and that is the only reason I was able to get that money. (490) I have not subtracted the thirty-five cents a thousand for railroading or hauling on that road. In making up these figures I figured that yellow pine was worth about $8.00 a thousand in the millpond. I never compiled the figures but I know that it cost more than $8.00 a thousand even to log the yellow pine because there was a very bad mismanagement there. Since I came here, Mr.

Gibbs himself attended to the logging. The yellow pine was logged at the same time the white pine was. The yellow pine did not come over the Tyson Creek railroad, it came from the Tyson district, but it went over a different road. That was not done by contract, we did that ourselves. The mixed timber, part of it came over the Tyson Creek Railroad and part came from other territory. (492) Now with reference to the Clarkia Railroad, that was about three miles west of Clarkia in Shoshone County, it is about fifty odd miles I think from St. Maries. It is a branch railroad of the Milwaukee going from St. Maries through Fernwood and Clarkia up to Bovill, Elk, River. When I came here, there wasn't any railroad at all and between the time I came here and July 29th, it was built. (496) It is about five miles long and while I could never get the exact figures together it cost us in the neighborhood of $15,000. I did not get the exact figures together because I didn't take the trouble to do it after bankruptcy proceedings intervened. It appears only on the books under labor performed, because we owed the money, we hadn't paid it out yet, we hadn't paid the laborers yet or the supplies, and instead of charging it on the books simply to the railroad I gave credit to the different people to whom we owed the money without giving the debit account credit for it. As to actual money that we paid out, we paid out very little; the rest of it is debts. So a part of the increase of liabilities is due to this Clarkia Railroad. I would say

that it amounted to about $15,000. (497) The Stack-Gibbs Lumber Company owns some timber up there, about three-quarters of a section or about 480 acres. That was white pine and mixed. My estimate was that there was about five million feet of white pine there. (498) There was about six or seven million feet of mixed and altogether about twelve million feet. Before I built this railroad, I talked it over with Mr. Coman and Mr. March of the Exchange National Bank. I may have mentioned it to several other creditors but I didn't make it a topic of discussion. I don't remember whether I wrote the Fort Dearborn National Bank or Merrill Cox & Company, I do not remember any more, I think I might have mentioned it to them that we were building a railroad but the correspondence will show that.

Mr. Post: Mr. Adams will you produce the correspondence of Mr. Katz?

Mr. Adams: Ithink I have it all except one or two letters in the deposition, but they haven't anything to do with the railroad.

The Witness: The actual work was begun on this railroad about the middle of June. It was preliminary work done all along—

Mr. Post: Now Mr. Adams has handed you a couple of files there and I wish you would see if you can find there any letters you have written to the Chicago people bearing on this railroad.

Mr. Adams: I do not want to interrupt but there isn't any letters there about the railroad.

The Witness: I remember after the railroad was almost completed, prior to going to Chicago, I dictated a letter in Mr. Coman's office mentioning that railroad, it was one of those letters of which I did not make a copy for myself or keep one, and I believe the letter was prior to that meeting in Chicago, July 26th. If I wrote to anyone it would be to Merrill Cox & Company because I never wrote the Fort Dearborn anything about the railroad as I remember it—

(Whereupon a short recess was taken upon resumption.)

The Witness: I find one letter in which I mentioned the railroad. It is of date February 22, 1916, addressed to the Fort Dearborn National Bank. That is the letter already introduced, exhibit No. 10. Between February 1st and July 29th I went back to Chicago. (501) I was back in the end of May, and the beginning of June, and the end of July. In May I met some of the creditors among them being Mr. Tilden of the Fort Dearborn National Bank, Mr. Fletcher, Mr. Aaron. I did not see Mr. Searle or Mr. Hess or Mr. Stack or any of those people. I met a representative of the Empire Lumber Company (502). I met no other creditor or representative of any of the creditors that signed the trust deed. I met no one except the persons I have named and the members of the bank in Spokane. I did meet Mrs. Gibbs once. I went back to Chicago to meet a representative of the Empire Lumber Company we had a contract with them and

trouble with them, and they threatened to sue and I settled with them. I went back there for that particular purpose and the meeting of the other gentlemen was only incidental. I went back in June because my mother died and was gone about a week. When I was there, I want to say the first time I was there I did not see Mr. Fletcher or anyone of the Fort Dearborn. (503) When I was back in Chicago it is possible that I mentioned to these people the Clarkia Railroad, but I do not remember anything about it. An engineer was sent up there to make a survey of the railroad. His name was Feller, Frank H. Feller. I talked to Mr. Coman, Mr. March and Mr. Green about it.

Q. You went into the matter very carefully to see whether it would be advisable to build a railroad or not?

A. Well, I did to some extent, and to some extent I relied upon what was told me by Mr. Gibbs in regard to the amount of timber on hand, which according to the books was considerably more than was actually found at all.

Q. I believe you said there was five million of white pine and seven million of other timber?

A. Correct.

Q. Did the books show in some way the quantity of white pine?

A. Yes, it showed a quantity of white pine, but it showed fifteen. (505)

In that matter, I relied on what they told me but also on what Mr. Gibbs said in regard to the amount

of timber on hand and to what it was worth according to the books. (506) On page 8 of exhibit 4, the first item is commissary supplies. That does not show in the books it is of record herein in an inventory by the receiver being on hand when the company went into the hands of a receiver, and there is another record here of the appraiser appraising it. These items commissary supplies, dynamite, horses and harness, and kitchen equipment, they were put down what the appraiser of the bankruptcy proceedings appraised them. The logs purchased is not the appraisement of the appraiser but is the price we paid for it. We paid $8.00 a thousand for the yellow pine just bought shortly before we went into the hands of a receiver and they were still there not used. (508) The appraisers appraised with reference to the commissary supplies. The appraisers appraised only that part of the property which was turned over from the receiver to the trustee. These commissary supplies and dynamite—horses and harness was sold already by the receiver. (509) Going back to stumpage, I didn't put down stumpage at its cost because I didn't know the cost, (514) but I put down the white pine at $4.00 a thousand the others at the figures stated, as I heretofore told you that I got at it. I explained to you at the time that as to the logs on page 7 that it was the cost of them to us. I told you that they were mostly bought, and I considered the average market price. I paid $13.00.

Q. Now when you determined the value of your

assets of July 29th—no February 1st—in order to determine what you call reduction in assets, in order to figure the amount of reduction in assets on page 7 you figured those assets at their market value or at least that part of it which is logged at their market value?

A. Yes, that is correct.

Q. But on the last two pages of your exhibit 4, where you undertake to show whether there was any gain or not in the value of the assets you do not put down these increased assets at the market value, but what you call cost, isn't that right? (515)

A. No, that is not the case.

Q. You put down at the top of the last page the statement that you had on hand July 29th, 1916, 1,250,000 feet of lumber more than you had on February 1st, don't you?

A. Yes.

Q. And you say that the average cost price of that lumber is $18,720?

A. Correct.

Q. But you do not put down here what was the value of that lumber in the mill yard?

A. That is exactly what I put down.

Q. Your record here is cost price?

A. Yes, that is the only way you can put down lumber in the mill yard, because—

Q. You mean to tell this court that you can't figure the value of lumber in the mill yard the same as you can figure the value of logs in the mill pond or the logs on a river before it got to the mill pond, or in the woods along a railroad track?

A. I think I can state that.

Q. But you can't figure it?

A. Yes. I haven't gone into details as to what the lumber that I had on hand July 29th, 1916, assuming that sixty per cent of it was white pine, what are the grades of it, and I can't ascertain that from the books. (516) The lumber has been sold. It was on hand February 1st, 1916, and also before July 29th, but I can't tell the different grades. I can tell on July 29th because nothing was added to it or very little, but February 1st there was constantly added to it and shipped and added and much I know what the original—I do not know exactly but I can look it up in the books. I can give it to you approximately. I should think there was about twelve million feet and we sold about eleven million feet during that period of time. If I would once take the time, I could find from the books the various grades that we sold, (517) and I could tell you what we got for it at the mill yard but I can't tell you the selling price of the lumber at the mill yard. We sold lumber only July 26th, 27th, 28th, and 29th, all grades of lumber and I can tell you what the different grades were. (518) My books will show what the different grades were; white pine and yellow pine, cedar and lath. I can't tell it to you from what books I have here.

Q. I know it isn't fair to figure cost in one place and figure market value in another place. Now at least I think you know the lath you have on hand, that you have on the last page there where you fig-

ured it at $1.25; is that figured at cost or is that figured at selling price?

A. That is figured at cost.

Q. What was the selling price of it?

A. I don't know offhand. They were different grades. There is white pine and there is yellow pine and there is cedar and larch.

Q. Your books will show what you were selling it for, won't they?

A. They will show.

Whereupon an adjournment was taken till February 26th, 1917. (519)

The Witness: My exhibit No. 4, the last page thereof, shows a statement of lumber on hand February 1st, 1916, of 4,612,000 feet and in February, 1916, I made an inventory of what lumber we had on hand which I am now producing. The papers I am showing you here, I found here all the trial balances between January 1st and June; in those trial balances we accumulated all the figures of the lumber on hand showing how the books stood on the first of each month. (520) The trial balance for February was gotten up by the bookkeeper but I have checked this particular one we were talking about, the February 1st trial balance. I checked it with the books and I have them here, which I now produce. This is the only thing that would show it; I had an inventory taken on the first of each month from the actual lumber; I started this, however, I think the first time in March or April, 1916. The inventory which this trial balance shows

there was taken the following week; on the first of January they took an actual lumber inventory and I had the lumber added to it and the shipments deducted from it and that is the way I got the inventory on the first of February. Later on in the following months when I was here, I had to check every month with the actual lumber and it usually agreed about. (521) I can't find the inventory of January 1st. They were usually given to the sales manager and he made from there his sales sheet, to send out to the salesmen and I can't find them. I never saw the lumber inventory of January, 1916. I was only told that the lumber inventory was on the books, they closed the books at that time. They made no entry on the books to show the amount of lumber on hand. It was kept in loose sheets. What I show you here isn't what I would call an inventory but it was kept up as you will find every month the same way and we have the inventory here—it was taken at the time the appraisers appraised the lumber, and it has to check with that—it did check. I have no other books or records in relation to that except what I hand you. (522) After I came out here it was checked up March 1st, 1916. I am awfully sorry that I haven't any paper that was prepared March 1st, 1916.

Q. Then no bookkeeper could go through the books that you have here in this court room or down at the mill, or anywhere else in this country and determine the quantity of lumber on hand February 1st, 1916?

A. Yes, it can be determined in exactly the manner in which I determined it there.

Q. From the books?

A. From the books.

Q. Well, produce the books, then, from which you can determine.

A. After a long pause.) No, I can't get it any more. It is impossible to get it now because we kept the amount only in dollars and cents. I can't give you anything further because it is impossible to get at it as it is kept only in the amount of dollars and cents.

Q. I will ask you the same question that I asked you before—could any bookkeeper or any accountant determine from the books here in this court house or the books of the Stack-Gibbs Lumber Company in the county, in this county, how much lumber there was on hand on July 29th, 1916, or within a few days either way?

A. No, I do not think they can. (523) We kept a record of the lumber that was manufactured in a book and one for February. I have here a book which hasn't any name but which contains a compilation of logs sawn and lumber derived from sawing the logs in different months. It starts in January, 1915. This heading here is February, 1916. This is a compilation and is compiled from a different book which I am (524) going to show you now. This book is called the log scale report book, shows every day as the logs went up the chain, the number of feet of each log as it was measured, that had to be added

every day. That is a book of original entry and it was taken by the log scaler in the mill. He writes it right down into this book. He makes his sheets and those sheets are afterwards put right in here. He does that of each log. (525) This books shows the scale of the log but it does not show the cut of the mill. The cut of the mill exceeds the scale of the log about twenty-eight per cent. I have the cut of the mill. I have every day the amount of lumber sawed, that was given on a little slip, that is a different scaler again, that is a lumber scaler, and those slips were each day entered in here. It compares—here is the logs sawn in February and here is the lumber sawn, and shows the overrun. The overrun in February happened to be 26.9 per cent; this was added to the old inventory and the shipments deducted. I have here a book that shows the lumber of each month. However, the lumber inventory was taken on typewritten sheets and the salesmen got them each month, and that is the last we saw of them. (527) I figured to put in here according to the log measure. The log scale here, 1,312,080 feet, that is of white pine. This book shows there was an overrun of about twenty-seven per cent more than the log scale and so figuring on mill run, I think that the cost of logs was less than fourteen dollars, that would be about ten dollars; $14.00 white pine, $8.50 yellow pine and $8.00 mixed, that was the way they charged long before I came and we kept it up.

Q. And the overrun for February, according to your books was 26.9 per cent?

A. Correct. (529) For April, the overrun was 34.7, April, 1916, and in May we charged the log account at the same rate. In June, 1916, it was charged back at the same rate, but it was not figured out here. I can show you on the log account; I can figure it out at the same rate. The book does not show the overrun there. It has not been figured out on that page. (530) In July, they were charged at the same rate. I can figure out what the overrun was, it was about the same. There is no way of determining the quantity of lumber on hand February 1st, 1916, except as I told you by adding what was sawed and deducting what was shipped, that is how we did it. Going back to January 1st, I mean —January 1st does not show on the books though. It only showed on the stock sheet which we had on hand at that time, but which we haven't any more. There is no way of checking it up. As to where I got the figures 4,612,000 at that time I got it through the stock sheets which I had on hand. I got it from those trial balances which I know were correct at the time. (531) Now in making up my figures for lumber on hand, July 29th, 1916, in Exhibit 4, I got the figures 5,864,000 in the same way, I had there June 1st; I added to it the lumber sawed during July and deducted from there the shipment and it was started at that time and we had besides an inventory at that time and had it checked up. I haven't that inventory now, it is not in existence any more. After the petition in bankruptcy was filed an inventory was taken of this lumber. It was taken

by Mr. Nelson, the one party that always did it under my direction. I was the receiver in bankruptcy. (532) I think it was filed.

(The referee here hands the inventory to Mr. Post.)

The Witness: That is the inventory we filed at that time. It was inventoried at something less than 5,864,000. It says here 5,611,000. I got the figures 5,864,000 from the lumber which I shipped as receiver and which the trustee shipped and added those two together; I remember at that time the actual inventory was about two hundred or two hundred and fifty thousand feet higher than I put it in as receiver, however, I wanted to be quite sure there wasn't any mistake about the lumber being on hand and I struck off a few hundred thousand feet. (533) I wanted to be dead sure about it that I wouldn't be charged afterwards there was more lumber and what happened to it; I know the lumber was there all right and came out a few hundred thousand feet more, but I struck off a few hundred thousand feet to be correct. I shipped as receiver 2,884,000 feet of lumber and 889,000 pieces of lath in accordance with my final report. But of this amount there was not on hand on the first of August, that is I sawed yet some logs during the receivership, the amount of 716,000 feet of lumber, 141,000 pieces of lath; the trustee shipped then the remaining lumber. The trustee did not manufacture any from the logs. The mill was then shut down a few days afterwards; the trustee shipped 3,587,000 feet, and to this the mold-

ing has to be added, 3,687,000 feet. I get this from the books of the trustee. (534) Now of the lumber on hand July 29th and February 1st, 1916, as to what part was white pine and how much yellow pine and how much mixed, I can not tell you any more. I can tell you, though, I know about what you want, I can tell you what we got for our lumber during this period, the sales price. As to the value of the lumber on hand February 1st, 1916, I haven't really given this matter much attention (535) I can give you an average price. On February 1st, there was lumber on hand 4,612,000 feet, but I can not give you the proportion of white pine and I know no way of getting at it. The white pine was worth more than the western pine. I do not know the market price of lumber at that time. I would think it was five or six dollars more a thousand than the western pine and western pine (536) —about $2 a thousand more than the mixed. I will give you an estimate as to what I would regard the proportionate amount of July 29th 2,954,000 feet of white pine, 2,015,000 yellow pine and 526,000 feet of mixed. In order to get the market value of the lumber on hand February 1st, 1916, we must approximately know how much white pine and how much yellow pine and how much mixed there was and to know the different grades as well. As to the different grades, they keep their stock in the right proportion and are not forced to ship out certain stock and have only the bad ones left, they can tell pretty well; but with our stock I think it was almost

impossible to put the same measure on as the stock of a good going concern—as to how much we sold between February 1st and July 29th, I can tell every month exactly what we shipped of each species, I mean white pine, yellow pine and mixed and can give you the amount each month. (538)

Witness states that the value of the different grades of lumber was higher in July, 1916, than February, 1916. "In making up the figures, Exhibit 4, although I made a figure to show what I call the grain in lumber, I did not figure on the value of the lumber as of February 1, 1916. I did not figure the sales value at all. I figured what we considered the average cost price of our lumber. I did not know and do not know what proportion of the figures in that exhibit of 4,612,000 feet as of February 1, 1916, was white pine. The cost price of white pine is different than the cost of yellow pine and mixed. In figuring cost price, I did not figure white pine stumpage at $4.00. I did not go into details. I figured on what we called average cost price. The value of stumpage for yellow pine is about $1.00 a thousand, while for white pine it is about $4.00 a thousand. We never went into details as to how much of the lumber was white pine or how much was yellow pine or how much was mixed."

Q. You just took a running jump at it?

A. That is about what we did.

Q. But in order to get at the average cost price, you have got to get the quantity of each kind of lumber, haven't you?

A. Well, in order to figure out exactly what the lumber really did cost, you have got to go into all those details like you have just mentioned.

Q. You take five million feet, for instance; if four million of it is white pine and one million of it is yellow pine, the average cost price would be different than if three million of it was white pine and two million yellow pine?

A. Certainly, Mr. Post.

Q. In determining this average cost price, did you figure that a certain proportion of it was white pine and a certain proportion of it was yellow pine and a certain proportion of it was something else?

A. I didn't, because I couldn't tell any more. I didn't have the figures any more than you have now.

Witness states that he cannot tell the value of the lumber on hand on July 29th, 1916, but that he has some reports from which he can tell their average sales price of all the lumber without regard to quality; that in February, 1916, the average sale prices were as follows:

White pine	$18.26
Yellow pine	12.21
Mixed	11.26

In March, 1916, as follows:

White pine	$19.00
Yellow pine	14.51
Mixed	11.95

In April, 1916, as follows:

White pine	$18.45
Yellow pine	12.88
Mixed	10.32

In May, 1916, as follows:

White pine	$19.07
Yellow pine	17.10
Mixed	13.51

In June, 1916, as follows:

White pine	$19.47
Yellow pine	16.10
Mixed	13.36

In July, 1916, as follows:

White pine	$19.16
Yellow pine	15.31
Mixed	13.60

Witness says in this same compilation that he has a memorandum of the average of sales prices from January 1st to July 1st, 1916, and the same for white pine was $18.03.

Q. What was the market price of white pine as it stood on the yard, of the different grades that were there on July 29, 1916.

A. I have never made an estimate according to that. I never figure out according to the grades or anything else. I couldn't tell you. Impossible to tell you without naming the grades.

Q. But if when you compare, if you were trying to get at and making up the schedule, Exhibit 4, the difference in the market value of the lumber at Gibbs, Idaho, as it was on February 1, 1916, and the value of the lumber as it stood at Gibbs, Idaho, on July 29, 1916, you would get up an entirely different set of figures than you did get up in Exhibit 4?

A. Yes, I certainly would go at it differently.

Q. And if you were undertaking to get the market value of the lumber as it stood at those two different dates, you would have to have the quantities of white pine and other classes of lumber as of each date, would you not?

A. Yes, sir.

Q. If it was less, if the percentage of white pine on February 1st was less than it was on July 29th, then it wouldn't be fair, would it, Mr. Katz, to subtract the two items and then determine the value on the difference? You couldn't do it that way, could you?

A. As a matter of mathematical calculation, not very well, unless you simply assumed an average.

Q. No, not an average. I say if the percentage as to white pine was different on February 1st than it was on July 29th, you couldn't do it this way, by subtraction?

A. No, sir.

Mr. Post: Now at this time before we go any further, I am going to move to strike out Exhibit 4 for the reason that it does not show anything on the subject of loss and gain from which the court can draw any inference. When they offered it in evidence, they offered it as a compilation made by this witness, stating what it showed could be discovered by an examination of the books. Now, take page 7 of this exhibit. It is headed "Reduction in Assets Between February 1st and July 29th." Go down to the word "logs" and bear in mind it says

that on February 1st they had on the banks of the river certain logs and they put in the value as market price less cost of delivery. He is charging himself with these logs at market price, putting in white pine logs at $13.00 a thousand, yellow pine at $8.00, mixed timber at $7.00. He is charging himself with the market price of these logs in order to make the value as of February 1, 1916. Now turn to the next to the last page of the exhibit, which covers "Addition to Assets Between February 1st and July 29th" and turn to the last page, and they say the lumber on hand is so many feet on February 1st, and so many feet on July 29th, the difference so much, and then he figures that difference at *cost* and says the total gain is $18,000. He has total loss at $80,000 and figures the loss on the logs at market price but does not figure the gain at market price or market value, but figures that on another basis which he calls cost. Now, of course, that is mere juggling with figures. That is not fair or attempting to be fair. It is clear that if we are going to figure the gain, you must take the lumber that was on hand February 1st and figure the market value of that lumber. If there was some lumber on hand July 29th, he must figure the market value of that lumber as of that date. On one side he calls it market value as to reduced assets, but as to the increased assets it is not market value, it is cost, which is conceded to be below market value. Not only that, but it is conceded that these figures that they have here cannot be gotten from the books. There is no way

of checking it up. No bookkeeper, no accountant, can come here and find out about it. It seems to me I have cross-examined this witness enough to show this Exhibit 4 is materially incorrect and should be stricken for that reason, and also should be stricken because you can't find out anything about it from the books, and when you cannot, he cannot go and make an exhibit and put it in here as a compilation of figures that we cannot check up.

The Referee: I am inclined to think that notwithstanding the fact that the witness testifies he was unable to glean this information—that is, a considerable portion of it—from the books, and is testifying quite exhaustively on the means at his command whereby he made the compilation known as Exhibit 4, and notwithstanding the fact that the witness is somewhat vague as to many of the items contained in the exhibit, yet, taking that in connection with his other testimony with reference to the method under which he proceeded, I am inclined to believe that Exhibit 4 is competent, relevant and material. My opinion is that it is not entitled to a very considerable weight; that is by reason of the fact that the witness testified, as far as I am able to glean from what he said in certain responses, it is made up of facts, the results of which are stated from what I intimated a moment ago, either the opinion or the best judgment of the witness. He testified also from other sources that he states are not in existence; as Mr. Post suggested, they are not here for cross-examination, and I am inclined to

think Exhibit 4 is not entitled to great weight as evidence, but I shall permit it to stand for what it is worth.

Mr. Post: Exception.

Whereupon an adjournment was taken until February 27th, 1917.

Resumption of

CROSS-EXAMINATION.

By Mr. Post: (566)

The Witness: Page 8 of Exhibit 4, logs purchased and owned there, 807,600 feet of yellow pine, those figures can be located in the book of the Stack-Gibbs Lumber Company. In the trial balance of February, 1916, I have a figure for the average selling price for the month of January, $17.28, January, 1916. These trial balances are all the same (566). The trial balance for the month of February shows $15.46 and for the month of July about $18.00.

Mr. Adams, on page 8 of Exhibit 4 it says, "Logs purchased and on hand 807,600 feet of yellow pine at $8.00 a thousand, $646.08." During the recess, in going over these figures I find that the stenographer made the mistake and instead of the figures given, it should be 80,760 feet of yellow pine and we ask leave to amend page 8 of Exhibit No. 4 by changing the figures 807,600 to 80,760 feet.

The Referee: I grant you leave to amend the exhibit. It will be amended as suggested. (592)

The Witness: From February 1, 1916, to July 29, 1916, there was no difference in the situation so

far as my agency or relationship was concerned to anybody between the Dryad Lumber Company and the Stack-Gibbs Lumber Company; that is to say, without discussing whether I was agent for anybody or not. My position as to one company was the same as my position as to the other company. I also made an investigation and got up some papers on the subject as to whether there was any gain or loss between February 1st, and July 29th, as to the Dryad Lumber Company.

Q. And you prepared a document showing that the company made a profit, whatever it was, of $18,-000 as to the Dryad Lumber Company?

Mr. Adams: Objection.

Referee: Overruled.

Mr. Adams: Exception.

A. Yes, sir. There was an old arrangement between the two companies whereby the Dryad sawed the logs. I haven't here the books of the Dryad Lumber Company.

Q. Now we digressed here. Taking up the other company, the Dryad, have you got the records of the Dryad showing how you got at the total gain of $18,489.17?

A. I have everything here, yes, sir.

Q. That is the figure, without putting it in the record?

A. Yes. I arrived at those figures as shown there. When the logs got into the mill pond they were manufactured by the Dryad Lumber Company into lumber. The work that was done from the time the logs came in to the loading of the cars of the logs

and lumber was done by the Dryad. There was no written contract between the two companies. The Stack-Gibbs Lumber Company gave the Dryad Lumber Company $3.00 a thousand for sawing the logs into lumber, $2.00 a thousand for planing such as was planed and loading it into the cars; if it was not planed, $1.00 a thousand for loading; if it went through the drykiln, $1.00 a thousand. Between February 1st and July 29th the Dryad handled about 18,000,000 feet of lumber. The Dryad did practically no other business except doing this work for the Stack-Gibbs.

Mr. Adams: If the court please, I desire to offer in evidence that portion of the appraisement made under the direction of this court in compliance with the bankruptcy act which refers to the lumber as shown by the appraisement.

Mr. Post: I object to it as incompetent, irrelevant and immaterial and inadmissible for the purpose of proving the value of lumber in this proceeding. (615)

Witness excused.

The Referee: I will sustain the objection, Mr. Adams, to your offer, for the reason that the controversy here involves the quantity and value of the property between the 1st day of February, 1916, and the 29th day of July, 1916, and that the instrument that is here offered relates to the quantity and value of the timber at a date subsequent to the date July 29th, 1916; I do not believe it is competent.

Mr. Adams: We take an exception.

C. O. Sowder, a witness called on behalf of the

petitioner, the Mechanics Loan & Trust Company and the Exchange National Bank of Spokane, and after being duly sworn, testified as follows:

TESTIMONY OF C. O. SOWDER.
DIRECT EXAMINATION

By Mr. Post:

The Witness: My name is C. O. Sowder. I am the cashier of the First Exchange National Bank of Coeur d'Alene. There is no other bank in Coeur d'Alene that has the name Exchange connected with it. I was cashier on February 1, 1916. That bank has an account with the Stack-Gibbs Lumber Company at that time. I have here a sheet of the ledger showing the account of the Stack-Gibbs Lumber Company on that date. This is the original ledger sheet as we use the loose leaf ledger system. (619) The ledger here shows that on February 1, 1916, that there was no overdraft in that account as on February 1, 1916, the Stack-Gibbs Lumber Company had a credit balance of $444.69. This sheet covers January 3, 1916, to March 17, 1916, and at no time during that period did they have an overdraft of $15,000 or as much as $15,000. On January 28th, there appears an overdraft of $563.42, which was the only overdraft from the week prior to February 1st and for two weeks after February 1st they did not have an overdraft. In January, they were overdrawn three times, January 1st, $1008.69 (620), January 10th, $101.30; January 11th, $7.80. These are the only overdrafts in January and there were no overdrafts in February.

CROSS-EXAMINATION.

By Mr. Adams:

The Witness: I am testifying only from the ledger sheet here, only from the books of the bank and not the books of the Stack-Gibbs Lumber Company. Of course, you can check without which showed on their books to be an overdraft. We would not have it until the check reached us for payment. (621) Checks are often in transit for several days before they reach the bank and if the deposits are made in sufficient time to meet them before the checks show up there is no overdraft. (622) The total checks on February 1st, $4,234.52, and the deposits were $4,600.85. That deposit may have been a check on the Exchange National Bank of Spokane. I do not know positively, but I can find out from the records of the bank, of course. On the second day of February the amount of withdrawals were $3,388.53 with a deposit of $3500. (623) I do not know where that deposit came from. Usually the checks that we pay, drawn on this account had been issued several days from the date the check bore, about a week, I would say. The amount of withdrawals from February 3rd to February 9th amounted to $12,127.88 (624). It is quite true that while our books might show a balance, the books of the Stack-Gibbs Lumber Company might show an overdraft.

REDIRECT EXAMINATION.

By Mr. Post:

The Witness: The total deposits from February 3rd to February 9th, inclusive, were $12,858.00.

Witness excused. (625)

(After the witness was excused, he was recalled from the bank and the following testimony was given.)

RE-CROSS EXAMINATION.

By Mr. Adams:

The Witness: The deposits that you mentioned, was the records show that it was a check drawn on the Exchange National Bank of Spokane. (626) I did not know anything about the Stack-Gibbs Lumber Company having any other checks out on February 1st. I had no knowledge of the books of the Stack-Gibbs Lumber Company. I did not know anything about what checks they had out. (627) In the bank we understood that the Stack-Gibbs Lumber Company were overdrawn at different times above the bank balance. I do not recollect who it was who told us that they were issuing checks in excess of their balance. (629)

Mr. Post: I offer in evidence Exhibit No. 52 and Exhibit No. 53.

These pieces of paper I got from the secretary of the Western Pine Manufacturers Association, and the witness, the secretary, left for Portland last night. They purport to show for the month of January, 1916, the average selling price of white pine in this general territory, and the same thing as to July, 1916. Perhaps I had better state in case they get lost something about these exhibits. Exhibit 52, being the January statement, concludes with the words, "average selling price, $19.20," and Exhibit 53, which is the July statement, concludes with the

words, "average selling price, $19.72;" that is Idaho white pine. I have had marked for identification two statements obtained from the same source for western pine; one is for January and concludes with the words, "average selling price, $14.76;" this is Exhibit 54, and the other is for July, 1916, and concludes with the words, "average selling price, $16.35," and this is Exhibit 55. I have two other statements obtained from the same source which I have marked for identification "Exhibits 56 and 57," 56 being for January, covering first, fir and larch,, and the statement is, "the average selling price is $10.39; covering spruce, with the statement that the average selling price is $11.31; and white fir, and the statement is, "the average selling price is $12.98; and cedar, with the statement that the average selling price is $10.63. The July statement, being Exhibit 56, says that as to fir and larch, the average selling price is $12.39; spruce, $16.75; white fir, $14.20; cedar, $12.36.

There being no objection, they were admitted. (632)

Mr. Post: I offer in evidence Exhibits No. 54, No. 55, No. 56 and No. 57.

Said exhibits were admitted without objection. (633)

Mr. Adams: I offer in evidence Exhibits 6 and 7, being the two notes for $10,000 and $5,000 held by the Exchange National Bank.

The Referee: They will be admitted.

Mr. Post: Exception.

The same being two notes, one for $5,000 and being note No. 27,075 made by the Stack-Gibbs Lumber Company, dated December 31st, 1915, bearing the cancellation stamp of the Exchange National Bank, dated February 14th, 1916, bearing revenue stamps cancelled thereon on December 31, 1915; and a note for $10,000, dated December 30, 1915, payable to the order of the Exchange National Bank, signed C. D. Gibbs and endorsed by the Stack-Gibbs Lumber Company, bearing the cancellation stamp of the Exchange National Bank of date February 14th, 1916, and having a revenue stamp thereon, cancelled December 30, 1915.

In the District Court of the United States for the District of Idaho, Northern Division.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, Bankrupt.

In the matter of the consolidated claims of the Mechanics Loan & Trust Company and The Exchange National Bank of Spokane.

Now, on this 8th day of December, 1917, the above cause coming on for hearing on the application of the respective parties hereto to settle the Bill of Exceptions herein, Merrill, Cox & Company appearing by its counsel, Harry L. Cohn, Esq.; Minnie A. Gibbs and I. F. Searle appearing by their counsel, H. W. Canfield, Esq., and the Mechanics Loan & Trust Company and the Exchange National Bank of Spokane, appearing by its counsel, Frank T. Post, Esq., and at it appearing that the proposed bill of excep-

tions and proposed amendments thereto were both served within the time limited by law and that the time for settling said bill of exceptions has not expired and the Court having duly allowed said proposed bill of exceptions and amendments thereto; and it further appearing to the Court that said bill of exceptions contains all of the material facts occurring in the trial of said cause, together with the exceptions thereto.

Therefore, on motion of Harry L. Cohn, one of said counsel,

It is hereby ordered that said Bill of Exceptions and the amendments allowed by this Court be, and the same is hereby settled as a true bill of exceptions in said cause and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, that it conforms to the truth and that it is in proper form and that it is a full, true and correct bill of exceptions and the Clerk of this Court is hereby ordered to file same as a record and transmit same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK S. DIETRICH,
Judge.

(Endorsed): Filed Dec. 26, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION AND ORDER ALLOWING APPEAL.

Comes now, W. A. Armstrong, the duly appointed,

qualified and acting Trustee in Bankruptcy herein, and Merrill, Cox & Company, Minnie A. Gibbs and I. F. Searle, feeling itself aggrieved by that certain Order made and entered herein on the 6th day of August, 1917, wherein the Report and Order of the Referee in Bankruptcy was confirmd, which said Referee's Order and Report was of date May 28th, 1917, and wherein it was ordered that a certain claim and amended claim of the Mechanics Loan & Trust Company be allowed and the Petition of the Exchange National Bank of Spokane, Washington, be granted and that the said Mechanics Loan & Trust Company be paid all dividends or monies that might thereafter be determined by the court to be due and payable to Merrill, Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Lincoln, Nebraska; Exchange National Bank of Spokane, Washington; Shoshone Lumber Company, Idaho Timber Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs until the said Mechanics Loan & Trust Company should have been paid the sum of $101,162.91, does hereby appeal from said order and judgments and from the whole and every part of each of said judgments and orders, and from the various and several orders entered in said cause prior to said final order of judgment, materially affecting the rights of the said W. A. Armstrong, Trustee in Bankruptcy, Merrill, Cox & Company, I. F. Searle and Minnie A. Gibbs, to the Circuit Court of Appeals of the United

States for the Ninth Circuit, for the reasons and upon the ground set forth in the assignment of errors which is filed herein and prays that this petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said final Order and Decree were made, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit. Your petitioners further pray that an order be made fixing the amount of security to be given and furnished for said appeal.

ROBERT WEINSTEIN,
Attorney for W. A. Armstrong,
Trustee in Bankruptcy.
ELMER H. ADAMS,
HARRY L. COHN,
ADAMS, CREWS, BOBB & WESTCOTT,
Attorneys for Merrill, Cox & Company.
REESE H. VOORHEES and
H. W. CANFIELD,
Attorneys for I. F. Searle and Minnie A. Gibbs.

The foregoing petition for appeal is granted and an appeal is allowed (excepting as to the Trustee in Bankruptcy), and the amount of the bond upon which said appeal is hereby fixed at the sum of $200.00 which bond when executed conditioned as provided by law and the rules of the Circuit Court of Appeals shall be a cost bond.

August 9th, 1917.

F. S. DIETRICH, Judge.

Due service of the within Petition and order acknowledged and a true copy received this 7th day of August, 1917.

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Mechanics Loan & Trust Company and Exchange National Bank of Spokane, Washington.

(Endorsed): Filed August 9th, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND.

KNOW ALL MEN BY THESE PRESENTS that Merrill, Cox & Company, I. F. Searle and Minnie A. Gibbs as principals and the National Surety Company, a corporation as surety, acknowledge themselves to be jointly and severally held and firmly bound unto the Stack-Gibbs Lumber Company, the above named bankrupt, and to the Mechanics Loan & Trust Company, a corporation, and the Exchange National Bank of Spokane, in the full, just sum of $200.00, lawful money of the United States, for the payment of which, well and truly to be made the said principals and the said surety bind themselves, their successors and assigns jointly and severally, firmly by these presents.

Dated this 9th day of August, 1917.

The condition of the foregoing obligation is such that whereas the above entitled Court in the above entitled cause, entered and rendered on the 6th day

of August, 1917, a final judgment and order in favor of the contention of the Mechanics Loan & Trust Company and the Exchange National Bank of Spokane wherein it sustains the allowance of the claim of the said Mechanics Loan & Trust Company and the petition and claim of the Exchange National Bank of Spokane and confirmed the report and order of the Referee in Bankruptcy entered on the 28th day of May, 1917, and whereas the above named principals, feeling themselves aggrieved by the said judgments and various orders entered in said cause prior to said final orders and decrees and said orders to the United States Circuit Court of Appeals for the Ninth Circuit, and whereas the Court has allowed said appeal and fixed a bond in the sum of $200.00.

NOW, THEREFORE, to protect the said appeal and in compliance with the order allowing the same, this obligation is given and if the said principals and appellants shall prosecute its said appeal to effect, and answer all damages and costs, if it shall fail to make good its appeal, then the above obligation shall be void, otherwise to remain in full force and virtue.

MERRILL, COX & COMPANY,
By Harry L. Cohn, its Attorney.
I. F. SEARLE and
MINNIE A. GIBBS,
By H. W. Canfield, their Attorney.
NATIONAL SURETY COMPANY,
By L. W. Ensign, its Attorney in Fact.

(Corporate Seal.)

The foregoing bond is hereby approved as to form, amount, and sufficiency of the sureties.

FRANK S. DIETRICH, Judge.

Received copy of the within this 7th day of August, 1917.

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Mechanics Loan & Trust Co., and the Exchange National Bank of Spokane, Washington.

(Endorsed): Filed Aug. 9, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now W. A. Armstrong, the duly appointed, qualified and acting Trustee in Bankruptcy herein, and Merrill, Cox & Company, I. F. Searle and Minnie A. Gibbs and in connection with their petition on appeal herein from the final order or decree entered in the above entitled action on August 6th, 1917, and from all other orders in said proceedings effecting the substantial rights of the said W. A. Armstrong, Trustee in Bankruptcy, as aforesaid, Merrill, Cox & Company, I. F. Searle and Minnie A. Gibbs and as assignments of error upon which it will rely upon the prosecution of their appeal says that in said record and proceedings there is manifest error in this to-wit:

I.

The District Court of the United States for the District of Idaho, Northern Division, erred in hold-

ing that the Referee in Bankruptcy herein had jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank of Spokane, Washington, or by either of them, to the dividends due or which should be found to be due and declared to the said Merrill, Cox & Company, I. F. Searle, Minnie A. Gibbs and other creditors of said estate, or to determine any rights whatsoever to the dividends to be declared herein as between the said Mechanics Loan & Trust Company or the said Exchange National Bank of Spokane, Washington, or either of them and the said creditors of said estate.

II.

The said Court erred in not sustaining the objections to these petitioners and other creditors to the testimony of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, E. D. Carpenter, Bob Wetmore, I. F. Searle, C. D. Gibbs and H. J. Aaron or any of them and not sustaining the objection of these petitioners and other creditors to the admission in evidence of any conversations had by and between the said E. T. Coman and either of said persons, or in the presence of said persons, to what was said about what should constitute 90 per cent of the creditors of said bankrupt; and in not sustaining the objection of these petitioners and other creditors to the admission in evidence of any conversations had by and between the said E. T. Coman and either of said persons, or in the presence of said persons, relative to what was

said about when said contract should take effect; and in not sustaining the objection of these petitioners and other creditors to the admission in evidence of any conversations had by and between said E. T. Coman and either of said persons, or in the presence of said persons, relative to what was said about what should be done under said contract; and in not sustaining the objection of these petitioners and other creditors to the admission in evidence of any conversations had by and between the said E. T. Coman and either of said persons, or in the presence of either of said persons, relative to what was said about Siegmund Katz coming to Spokane, Washington, or Gibbs, Idaho; and in not sustaining the objection of these petitioners and other creditors to the admission in evidence of any conversations had by and between the said E. T. Coman and either of said persons, or in the presence of either of said persons, relative to what was said about what the said Siegmund Katz should do and relative to what was said about the financial condition of the Mechanics Loan & Trust Company and relative to what was said about the Exchange National Bank of Spokane, Washington, advancing any money or funds.

II-a.

That the Court erred in not sustaining the objection of these petitioners and other creditors to the testimony of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, E. D. Carpenter, Bob Wetmore, I. F. Searle, C. D.

Gibbs and H. J. Aaron, and in admitting parole evidence of said E. T. Coman in substance as follows:

> "Mr. Gibbs submitted a statement of his assets and liabilities at Minneapolis and a copy of that statement was furnished not only to us but to all of the other creditors there, and the way we figured it out was that when we submitted it to Mrs. Tolerton that completed the necessary signatures by them or the 90%."

II-b.

That the Court erred in not sustaining the objection of these petitioners and other creditors to the testimony of E. T. Coman as to conversations had between himself and John Fletcher, S. H. Hess, E. D. Carpenter, Bob Wetmore, I. F. Searle, C. D. Gibbs and H. J. Aaron, and in admitting parole evidence of said E. T. Coman in substance as follows:

That it was talked of, understood and agreed that the Mechanics Loan & Trust Company was not able to advance the money and comply with the provisions of said contract as to such advancements, and that the Exchange National Bank of Spokane, would make said advancements and furnish said money.

III.

The said court erred in not holding that the said referee based his decision upon incompetent testimony.

IV.

The said Court erred in refusing to sustain the objections made by these petitioners to the claim of the Mechanics Loan & Trust Company.

V.

The said Court erred in refusing to sustain the objections of these petitioners to the filing and allowance of the claim and petition of the Exchange National Bank of Spokane, Washington.

VI.

The said Court erred in allowing the claim of the Mechanics Loan & Trust Company in the sum of $101,162.91 or in allowing the said claim for any sum.

VII.

The said Court erred in not sustaining the objection of these petitioners that the Referee was in error in finding that the evidence disclosed that the sum of $639,940.56 was considered by the signers of said trust agreement to be at least 90 per cent of the indebtedness of said bankrupt at the time of signing said trust agreement and that when Genevieve H. Tolerton signed then that 90 per cent of said indebtedness of said bankrupt would have signed.

IX.

The said Court erred in refusing to hold that the Referee committed error in finding that Siegmund Katz was not only to become a stockholder and an officer of the Stack-Gibbs Lumber Company but was also to represent the Mechanics Loan & Trust Company.

X.

The said Court erred in holding that the Mechonics Loan & Trust Company took possession of the property of the Stack-Gibbs Lumber Company by

and through the said Siegmund Katz as its representative and erred in not holding that the Referee committed error in such finding.

XI.

The Court erred in holding that insofar as the signers of the trust agreement were concerned Section 3170 of the Idaho Revised Code as to change of possession was complied with by the said Mechanics Loan & Trust Company and by refusing to hold that the Referee committed error in such findings.

XII.

The Court erred in holding, ordering and adjudging that the said Mechanics Loan & Trust Company be paid all dividends or moneys that might thereafter be determined by the court to be due and payable to the following persons or corporations signing said trust agreement, to-wit, Merrill, Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Lincoln, Nebraska; Exchange National Bank of Spokane, Washington; Shoshone Lumber Company, Idaho Timber Company, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs until the full amount of $101,162.91 was paid and in ordering and adjudging that said sum be declared to be a first lien upon the dividend of the said respective parties and erred in not holding that the Referee committed error in such finding.

XIII.

The Court erred in granting the petition of the Exchange National Bank of Spokane, Washington,

with the modification that all sums thereafter found to be due and payable to the Mechanics Loan & Trust Company should be paid jointly with the said Exchange National Bank of Spokane, Washington, and erred in not holding that the Referee committed error in such finding.

XIV.

The Court erred in finding that the evidence discloses that it was understood by the signers of the trust agreement that the Mechanics Loan & Trust Company possessed but small capital but that the Exchange National Bank of Spokane would advance whatever money was necessary to the proper execution of the trust not to exceed the sum of $100,-000.00 and in finding that the said bank did this to the extent of said sum and erred in refusing to hold that the Referee committed error in this finding.

XV.

The said Court erred in allowing the said claim of the said Mechanics Loan & Trust Company for the reason that the said Mechanics Loan & Trust Company is and was not the owner of the notes mentioned in said claim and the evidence shows that it has and had no claim whatsoever against the bankrupt and the Court erred in not holding that the Referee erred in allowing said claim for said reasons.

XVI.

The Court erred in allowing the claim of the said Mechanics Loan & Trust Company for the reason that the said Mechanics Loan & Trust Company did

not loan, advance or furnish to the above named bankrupt any sum of money whatsoever and erred in not holding that the Referee committed error in his finding in this respect.

XVII.

The Court erred in allowing and ruling that the alleged contract, a copy of which was attached to the amended claim of the Mechanics Loan & Trust Company was signed by 90 per cent in amount of the indebtedness of the said bankrupt for the reason that said alleged contract never became operative by reason of the failure to secure the signatures of 90 per cent in amount of said creditors and erred in refusing to hold that the Referee committed error in making such finding.

XVIII.

The Court erred in not holding and deciding that the said trust agreement was and is invalid.

XIX.

The Court erred in not sustaining each and every exception and objection made and contained in the petition of these petitioners and other creditors for the review of the report of the Referee made on the 28th day of May, 1917, which said petition was filed June 7th, 1917.

XX.

The Court erred in confirming the report and order of the Referee which it...

XXI.

The Court erred in failing and refusing to specifically or at all sustain the first ground of error

assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "a".

XXII.

The Court erred in failing and refusing to specifically or at all sustain the second ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "b".

XXIII.

The Court erred in failing and refusing to specifically or at all sustain the third ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "c".

XXIV.

The Court erred in failing and refusing to specifically or at all sustain the fourth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "d".

XXV.

The Court erred in failing and refusing to specifically or at all sustain the fifth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "e".

XXVI.

The Court erred in failing and refusing to specifically or at all sustain the sixth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "f".

XXVII.

The Court erred in failing and refusing to specifically or at all sustain the seventh ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "g".

XXVIII.

The Court erred in failing and refusing to specifically or at all sustain the eighth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "h".

XXIX.

The Court erred in failing and refusing to specifically or at all sustain the ninth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "i".

XXX.

The Court erred in failing and refusing to spe-

cifically or at all sustain the tenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "j".

XXXI.

The Court erred in failing and refusing to specifically or at all sustain the eleventh ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "k".

XXXII.

The Court erred in failing and refusing to specifically or at all sustain the twelfth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "l".

XXXIII.

The Court erred in failing and refusing to specifically or at all sustain the thirteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "m".

XXXIV.

The Court erred in failing and refusing to specifically or at all sustain the fourteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in

rendering its said decision, said ground being subnumbered therein as "n".

XXXV.

The Court erred in failing and refusing to specifically or at all sustain the fifteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "o".

XXXVI.

The Court erred in failing and refusing to specifically or at all sustain the sixteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "p".

XXXVII.

The Court erred in failing and refusing to specifically or at all sustain the seventeenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "q".

XXXVIII.

The Court erred in failing and refusing to specifically or at all sustain the eighteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "r".

XXXIX.

The Court erred in failing and refusing to specifically or at all sustain the nineteenth ground of error assigned by these petitioners in their petition for review upon which the District Court passed in rendering its said decision, said ground being subnumbered therein as "s".

XL.

The said Court erred in refusing to incorporate in its said order and decree upon review paragraph "I" of the Findings of Fact requested by these petitioners to be made and entered.

XLI.

The Court erred in refusing to adopt paragraph "II" of the Findings of Fact requested by these petitioners to be made and entered.

XLII.

The Court erred in refusing to adopt paragraph "III" of the Findings of Fact requested by these petitioners to be made and entered.

XLIII.

The Court erred in refusing to adopt paragraph "IV" of the Findings of Fact requested by these petitioners to be made and entered.

XLIV.

The Court erred in refusing to adopt paragraph "V" of the Findings of Fact requested by these petitioners to be made and entered.

XLV.

The Court erred in refusing to adopt paragraph

"VI" of the Findingss of Fact requested by these petitioners to be made and entered.

XLVI.

The Court erred in refusing to adopt paragraph "VII" of the Findingss of Fact requested by these petitioners to be made and entered.

XLVII.

The Court erred in refusing to adopt paragraph "VIII" of the Findings of Fact requested by these petitioners to be made and entered.

XLVIII.

The Court erred in refusing to adopt paragraph "IX" of the Findings of Fact requested by these petitioners to be made and entered.

XLIX.

The Court erred in refusing to adopt paragraph "X" of the Findings of Fact requested by these petitioners to be made and entered.

L.

The Court erred in refusing to adopt paragraph "XI" of the Findings of Fact requested by these petitioners to be made and entered.

LI.

The Court erred in refusing to adopt, make and enter paragraph 'I" of the Proposed Conclusions of Law, requested by these petitioners.

LII.

The Court erred in refusing to adopt, make and enter paragraph "II" of the Proposed Conclusions of Law, requested by these petitioners.

LIII.

The Court erred in refusing to adopt, make and

enter paragraph "III" of the Proposed Conclusions of Law, requested by these petitioners.

LIV.

The Court erred in refusing to sign the Proposed Order of Decree requested by these petitioners.

LV.

The Court erred in confirming the order entered May 28th, 1917, wherein the Referee in Bankruptcy allowed the amended proof of claim of the Mechanics Loan & Trust Company and the petition of the Exchange National Bank of Spokane, Washington.

WHEREFORE, these petitioners, W. A. Armstrong, Trustee in Bankruptcy, Merrill Cox & Company, I. F. Searle, and Minnie A. Gibbs prays that the decrees and orders of the United States District Court for the District of Idaho, Northern Division, appealed from herein, be reversed and the said cause be remanded with instructions to the said District Court to sustain each and all of the assignments of error and grounds set forth for review in the petition for review filed herein by these petitioners and other creditors of date June 7th, 1917; that the claim of the Mechanics Loan & Trust Company filed herein be disallowed and ordered disallowed and the petition of the Exchange National Bank of Spokane be ordered dismissed and that the said proceedings and the said orders and decrees be corrected and made to conform to the facts as produced at the trial and the law as may be announced by this Court and that these petitioners have any other and further relief that this Honorable Court may deem meet

and equitable, and consistent with the record herein.

ROBERT WEINSTEIN,
Attorney for W. A. Armstrong, Trustee in Bankruptcy.

ELMER H. ADAMS, HARRY L. COHN,
ADAMS, CREWS, BOBB & WESCOTT,
Attorneys for Merrill Cox & Company.

REESE H. VOORHEES &
H. W. CANFIELD,
Attorneys for I. F. Searle and Minnie A. Gibbs.

Due service of the within Assignment of Error acknowledged and a true copy received this 7th day of August, 1917.

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Mechanics Loan & Trust Company and the Exchange National Bank of Spokane.

Endorsed: Filed Aug. 9, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the Above Court:

You will please prepare transcript on the above entitled cause in the matter of the allowance of the claim of the Mechanics Loan & Trust Company and the Exchange National Bank of Spokane, and include therein:

1. Petition for supervision and review.
2. Bond.
3. Petition and order allowing claim.
4. Exceptions.
5. Proposed findings, order and refusal of court.

6. Assignments of error.

7. Report and order of referee allowing claim.

8. Petition for review.

9. Opinion of the District Court directing order allowing claim.

10. Order allowing claim Mechanics Loan & Trust Company.

11. Amended proof of claim Mechanics Loan & Trust Company.

12. Trustee's objections to allowance of claim, Mechanics Loan & Trust Company.

13. Creditors objections to allowance of claim, Mechanics Loan & Trust Company.

14. Petition of Exchange National Bank.

15. Motion to strike petition of Exchange National Bank.

15½. Order affirming referee's order allowing claim.

16. Answer to petition of the Exchange National Bank.

17. Citation.

18. Order extending time for filing transcript to September 12th, 1917.

19. Order extending time for filing transcript to October 12th, 1917.

20. Order extending time for filing transcript to November 12th, 1917.

21. Order extending time for filing transcript to December 12th, 1917.

22. Order extending time for filing praecipe to September 12th, 1917.

23. Order extending time for filing praecipe to October 12th, 1917.

24. Order extending time for filing praecipe to November 12th, 1917.

25. Order extending time for filing praecipe to December 12th, 1917.

26. Narrative form of testimony and bill of exceptions, including all amendments as it shall finally be allowed by the court.

MERRILL COX & COMPANY,
By Harry L. Cohn & Elmer H. Adams,
Their Attorneys.
MINNIE A. GIBBS and I. F. SEARLE,
By Reese H. Voorhees and H. W. Canfield,
Their Attorneys.

Filed Dec. 24, 1917. W. D. McReynolds, Clerk.

In the District Court of the United States for the District of Idaho, Northern Division.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, a Corporation,

Bankrupt.

IN THE CONSOLIDATED MATTER OF THE CLAIM OF MECHANICS LOAN & TRUST COMPANY, AND THE PETITION OF EXCHANGE NATIONAL BANK OF SPOKANE, WASHINGTON.

Citation.

United States of America,—ss.

The President of the United States to Mechanics Loan & Trust Company, a corporation, and Exchange

National Bank of Spokane, Washington, a corporation, Greeting:

You, and each of you, are hereby notified that in the above entitled action in the District Court of the United States for the District of Idaho, Northern Division, an appeal has been allowed to I. F. Searle, Minnie A. Gibbs and Merrill Cox & Company, creditors of the above named bankrupt therein, to the Circuit Court of Appeals of the United States for the Ninth Circuit, and you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, on the 12th day of September, 1917, pursuant to an appeal duly obtained and filed in the clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein you, and each of you, are appellees and the said I. F. Searle, Minnie A. Gibbs and Merrill Cox & Company are the appellants, and show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that which may pertain to justice to be done in the premises.

WITNESS the Honorable Frank S. Dietrich, United States Judge for the District of Idaho, at Boise, Idaho, on the 13th day of August, in the year of our Lord one thousand nine hundred and seventeen.

FRANK S. DIETRICH,
United States District Judge.

Filed Aug. 13, 1917. W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,
(Seal) Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 390, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled matter, and that the same, together constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript, (except the omission of orders extending time, which orders have been filed in the office of the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $586.15, and that the same has been paid by the appellants.

Witness my hand and seal of said court this 2nd day of January, 1918.

W. D. McREYNOLDS,
(Seal) Clerk.

No. 3110.

United States Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company,

Appellees.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, Bankrupt.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

HARRY L. COHN,
501 Mohawk Block, Spokane, Washington.
ELMER H. ADAMS and
E. C. TOURGE,
76 Monroe Street, Chicago, Illinois,
Attorneys for Merrill, Cox & Company,
Appellants.
REESE H. VOORHEES and
H. W. CANFIELD,
Spokane & Eastern Trust Building, Spokane, Washington,
Attorneys for I. F. Searle and Minnie A. Gibbs, Appellants.

JAN 1 1918

THE FRANKLIN PRESS, SPOKANE

No. 3110.

United States

Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company,

Appellees.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, Bankrupt.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

HARRY L. COHN,
501 Mohawk Block, Spokane, Washington.
ELMER H. ADAMS and
E. C. TOURGE,
76 Monroe Street, Chicago, Illinois,
Attorneys for Merrill, Cox & Company, Appellants.
REESE H. VOORHEES and
H. W. CANFIELD,
Spokane & Eastern Trust Building, Spokane, Washington,
Attorneys for I. F. Searle and Minnie A. Gibbs, Appellants.

I.

THE COURT EXCEEDED ITS JURISDICTION IN ENTERING THE ORDER COMPLAINED OF IN WHICH IT AWARDED TO THE MECHANICS LOAN AND TRUST COMPANY AND EXCHANGE NATIONAL BANK THE DIVIDENDS PAYABLE TO APPELLANTS.

Taft vs. Century Savings Bank,
15 A. B. R. 597;
141 Fed. 396.
(C. C. A. Ia.)

Edelstein vs. United States,
149 Fed. 636 (638).
(C. C. A. 8th Cir.)

Re Colombia Real Estate Company,
101 Fed. 965 (970).
(App. Dism. 112 Fed. 643.)

Re Billings, 145 Fed. 395 (400).

Re Girard Glazed Kid Co.,
136 Fed. 511.

Re Hollander, 181 Fed. 1019.

Re American Electric Telephone Co.,
211 Fed. 88 (90).
(C. C. A. 7th Cir.)

Stires vs. First National Bank,
119 N. W. Rep. 258.

Denny vs. McCown,
34 Ore. 47;
54 Pac. 955.

Wiggins vs. Columbian Fireproofing Co.,
227 Pa. 511;
76 Atl. 742.

Brauer vs. Laughlin,
235 Ill. 265;
85 N. E. 283.

Fulton vs. Fisher,
239 Mo. 116;
143 S. W. 438.

Davis vs. Silverton,
47 Ore. 171;
82 Pac. 16.

Lewis Pub. Co. vs. Wyman,
182 Fed. 13 (18).
(C. C. A. 8th Cir.)

Linden Inv. Co. vs. Houstain Bros. Co.,
221 Fed. 178.
(C. C. A.)

Henrie vs. Henderson,
145 Fed. 316.
(C. C. A. 4th Cir.)

II.

PAROL EVIDENCE IS INADMISSIBLE FOR THE PURPOSE OF VARYING THE UNEQUIVOCAL TERMS OF THE "TRUST AGREEMENT" THEREBY PERMITTING THE SUBSTITUTION OF THE EXCHANGE NATIONAL BANK FOR THE MECHANICS LOAN AND TRUST COMPANY.

American National Bank vs. Harlan,
89 Md. 675;
43 Atl. 756.

Evans vs. Duncan,
82 Ia. 401;
48 N. W. 922.

Young America Engine Co. vs. City of Sacramento,
47 Cal. 594.

Union National Bank vs. International Bank,
22 Ill. App. 652 (655),
(Affd. 123 Ill. 510).

Newberry Land Co. vs. Newberry,
95 Va. 119;
27 S. E. 899.

III.

THE EXCHANGE NATIONAL BANK IS A MERE VOLUNTEER, AND THEREFORE NOT ENTITLED TO BE SUBROGATED TO THE SECURITY HELD BY THE MECHANICS LOAN AND TRUST COMPANY.

Aetna Life Insurance Company,
vs.
Middleport,
124 U. S. 534,
31 L. Ed. 537,
(and cases cited).

McKinnon
vs.
New York Assets Realization Company,
217 Fed. 339.

Citizens Trust Company,
vs.
Mullunix,
235 Fed. 875.

IV.

THE TRUSTEE ACTED IN BAD FAITH, THEREFORE NOT ONLY IT BUT THE EXCHANGE NATIONAL BANK, WHICH CLAIMS IN PRIVITY WITH IT, SHOULD BE DENIED ALL PRIORITY.

V.

THE TRUST AGREEMENT NEVER BECAME OPERATIVE, DUE TO THE FACT THAT NINETY PER CENT OF THE CREDITORS NEVER EXECUTED THE SAME, THEREFORE NO CLAIM FOR PRIORITY THEREUNDER CAN BE MAINTAINED, AND PAROL EVIDENCE TO VARY THE CONDITION PRECEDENT IS INADMISSIBLE AND SHOULD HAVE BEEN EXCLUDED.

Lawrence vs. Davis,
Fed. Cas. No. 8137.

Bell vs. Mendenhall,
78 Minn. 57;
80 N. W. Rep. 843.

STATEMENT OF FACTS.

(Numbers refer to pages of printed abstract.)

The record upon which this appeal is taken is based upon an order of the District Court of the United States for the Northern District of Idaho, sustaining an order entered by the Hon. L. L. Lewis, Referee in Bankruptcy for said District, presented to the District Court upon certificate for review (78-87).

Owing to the necessity of arguing at length the facts deducible from the evidence and as they appear in the record in our brief and argument to follow this statement, we will undertake merely to give the court at this time an outline of the situation presented.

The Stack-Gibbs Company and the Dryad Lumber Company were practically one concern, the same stockholders, directors and officers (152). The Dryad Lumber Company ran the sawmill. The Stack-Gibbs Lumber Company ran the lumber yard (153). Originally it was one concern, but for reasons not pertinent to this record, the enterprise was divided into two companies, and due to the fact that practically the entire business of the two companies was transacted by the Stack-Gibbs Lumber Company and that whatever is hereinafter stated with respect to either applies as well to the

other, we will eliminate needless repetition and explanation and we will refer only to the "Stack-Gibbs Company."

It appears from the record that in the latter part of the year 1915, the Stack-Gibbs Company became involved in financial difficulties (90-221). As a matter of fact this condition had existed for a period of years, which, however, was unknown to the creditors. The Exchange National Bank then was and still is a National Bank doing business at Spokane, Washington, one E. T. Coman was and is the President. One C. D. Gibbs was the President of the Stack-Gibbs Company and also its representative.

The record shows that Gibbs carried the principal account of his company with Coman's bank (223-237), and that that bank kept in touch with the affairs of the Stack-Gibbs Company (246). The company also borrowed large amounts of money from various other banks throughout the country. A large amount of its paper and the paper of its customers being discounted through the paper house of Merrill, Cox & Company of Chicago, Illinois.

The record also shows that during the latter part of the year 1915, the Stack-Gibbs Company had large overdrafts with the Exchange National Bank running as high as $37,000.00, and that it carried

its account under two headings, "Carrying Account No. 1" and "Balance Account No. 2" (237-251). The excuse being given for No. 2 account was that the Stack-Gibbs Company never maintained any balance and was overdrawing, and that Mr. Coman was attempting to copy the plan of some eastern bank whereby he could always have a balance on hand (246). The bank would therefore have some officer of the Stack-Gibbs Company execute accommodation paper to the Stack-Gibbs Company, which that company would then endorse and discount under the "Balance Account No. 2," and that this account could only be drawn against over the counter signature of Mr. Coman, the President of the Bank (237). The net result of these transactions was that while an observation of "Account No. 2" on the books of the Exchange National Bank would show a balance in favor of Stack-Gibbs Company of $10,000.00, $15,000.00 or $20,000.00, as the case might be, the carrying account on the books of the Exchange National Bank, being "Account No. 1," would dislcose an overdraft of amounts varying from time to time from $200.00 to $37,000.00 (237).

The Stack-Gibbs Company, in carrying its account with the Exchange National Bank, did not so divide the account into two parts as was done by the bank, but carried it all in one account, so that at all times, the books of the company, what-

ever notes were discounted with the Exchange National Bank, whether credited to the balance account or to the carrying account, disclosed the true condition and state of affairs with respect to the transactions between the bank and the Stack-Gibbs Company.

On January 2, 1916, the books of the Stack-Gibbs Company disclosed a large balance on hand in its favor as against the Exchange Bank, whereas the books of the Exchange Bank disclosed the reverse condition. It is accounted for in two ways. The Stack-Gibbs Company was "kiting" checks. Its system was to draw checks on one or two of the various other banks with which it was carrying accounts, and send these checks to the Exchange Banks for credit. Furthermore, the deposits on the Stack-Gibbs books showed a $15,000.00 item balance account—which item becomes of extreme importance in this controversy—whereas the bank on the carrying account did not show these balances (203).

The record discloses that either in the latter part of December, 1915, or in the early part of January, 1916, Mr. Gibbs, President of the Stack-Gibbs Company, informed Mr. Coman, President of the Exchange Bank, with respect to the precarious financial condition of the Stack-Gibbs Company. Of this the record is certain that in January, 1916,

Gibbs discussed with Coman the question and advisability of calling together the creditors of the Stack-Gibbs Company for a consultation (215-246). Under Coman's advice a letter was sent to all the creditors calling a meeting of the company at Minneapolis to be held on the 27th or 28th of January, 1916. A week before the meeting was held, Coman sent a man to the plant of the Stack-Gibbs Company for the express purpose of checking over the financial affairs of that concern (246). The record also discloses that this had previously been done by Mr. Coman.

As to the various other things done by the Exchange Bank and by Coman, its President, from that time until the meeting of the creditors and at that meeting, we will dwell more at length hereafter. Suffice it to say that a meeting was held at which Gibbs and Coman were present.

As a result of that meeting, a certain contract or agreement was entered into wherein Stack-Gibbs Lumber Company, Dryad Lumber Company, C. D. Gibbs, Mechanics Loan & Trust Company appeared as parties of the first part; the Mechanics Loan & Trust Company as "Trustee" appeared as party of the second part, and sundry creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company appeared as parties of the third part,

which agreement appears in words and figures as follows (90):

THIS INDENTURE, made this 1st day of February, in the year of our Lord, One Thousand and Nine Hundred and Sixteen, by and between Stack-Gibbs Lumber Company, a corporation organized under the laws of Michigan, hereinafter referred to as the "Lumber Company," Dryad Lumber Company, a corporation organized under the laws of Washington, hereinafter referred to as the "Mill Company," C. D. Gibbs, of Spokane, Washington, hereinafter referred to as "Stockholder," and Mechanics Loan and Trust Company, a corporation organized and existing under the laws of Washington, hereinafter known as "Holder of the Trust Deed," parties of the first part, and Mechanics Loan and Trust Company, a corporation organized and existing under the laws of the State of Washington, hereinafter referred to as the "Trustee," party of the second part, and sundry creditors of the Lumber Company and Mill Company, who have executed this instrument for the purpose of acceding to its terms and becoming bound thereby, who are hereinafter referred to as the "Creditors," party of the third part.

WITNESSETH:

That whereas, the Lumber Company and the Mill

Company have heretofore been and are now engaged in the business of logging and manufacture of lumber and allied products, and as well other business relating thereto, in the course of which business they have incurred indebtedness to divers individuals and corporations;

And whereas, the value of the property of the Lumber Company and the Mill Company considerably exceeds their indebtedness, but nevertheless they are unable to obtain means to pay the indebtedness due and presently to become due;

And whereas, all the parties hereto are agreed that the plan herein outlined for realizing upon the property of the Lumber Company and the Mill Company and securing money to pay their presently due indebtedness and for satisfying their indebtedness is for the best interests of all concerned, and necessary to be adopted in order to avoid the heavy costs and expenses which would attend upon the realizing upon their property and the settlement of their indebtedness through receivership or bankruptcy proceedings;

Now, therefore, in consideration of the premises hereof and of other good and valuable consideration moving between the parties hereto, the said Stack-Gibbs Lumber Company and the said Dryad Lumber Company do hereby assign, transfer, set

over, give, grant, bargain, sell, convey, remise, release and confirm unto the said Mechanics Loan & Trust Company, its successors or assigns, as Trustees as hereinafter set forth, all and singular the hereinafter described property, to-with:

(Here was inserted description of various properties.)

TO HAVE AND TO HOLD to the said Trustee, its successors or assigns, to its and their use forever, but in trust, nevertheless, and for the uses hereinafter described property, to-wit:

1. The Trustee shall forthwith take possession of the trust estate as of an estate in fee simple, and shall have and possess the same power to control, use, manage and dispose of the same, and to incur all proper expenses in connection therewith, as in its judgment shall seem to the best interest of all the parties hereto, as though it was the absolute owner thereof.

2. The Trustee may, in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company; may operate mills, cut logs, saw timbers, manufacture lumber into various forms, and transact any form of business heretofore conducted by the Lumber Company and Mill Company and for such purposes, or any

other purpose which it deems proper and in realizing upon the trust estate, may use any and all of the trust estate as it thinks best, and in carrying on such business it may incur such expense as it thinks necessary to the proper conduct thereof, including necessary maintenance, replacement or supplying of new tools, machinery and apparatus.

3. The Trustee may employ such persons as it deems necessary, officers and employees of the Lumber Company and Mill Company, as well as others, for the proper management, use, enjoyment, and realization upon the trust estate, and may pay such persons so employed reasonable compensations.

4. The Trustee shall collect such debts owing to the Lumber Company and Mill Company as are collectible in the exercise of ordinary diligence, and may take security for, extend time of, compromise, or in any way it thinks proper settle any debt which in its opinion is of doubtful collectibility.

5. The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof, and shall have power to sell and convey any or all of the trust estate at such prices and upon such terms as it considers proper, and its deed or bill of sale shall convey full and complete title to the purchaser

free and clear of all right, title, claim or lien of the Lumber Company or of any other party hereto.

6. The Trustee shall receive as compensation, for its services as Trustee hereunder, the sum of Ten Thousand Dollars ($10,000.00), provided the Trusteeship is terminated within two (2) years from the date hereof, and shall be entitled to reimbursement for sums paid for legal services in the administration of the trust, including the preparation of this instrument.

7. The Trustee may, but shall not be required to, pay the claim of any creditor of the Lumber Company and the Mill Company who does not desire to become or who is deemed inadvisable to have become a party to this Instrument, except as modified in Sec. 10 hereof.

8. The Trustee may institute, conduct or defend any suit or litigation which it considers advisable or necessary to the protection of the trust estate, and it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation, including attorneys' fees.

9. If in the conduct and management of the trust estate damage is done third parties to whom the Trustee is or may be held liable therefor, the Trustee shall be reimbursed and indemnified against

any liability of claim therefor from the trust estate, whether such damage was caused by the negligence or misconduct of its officers, agents, employees or not.

10. The Trustee shall advance such sum of money as it deems necessary to meet the present payroll of the Lumber Company and the Mill Company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000.00) Dollars, and the Trustee shall have a first and preference claim upon said trust estate for the amount of such advancement and the same shall be repaid to it out of the first proceeds of sales of the trust property or any part thereof or the first proceeds of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of six per cent per annum.

11. Payments made by the Trustee under the provisions of Section 1 to 10, inclusive, hereof, with interest from the time of payment to reimbursement, as well as the compensation of the Trustee, shall be deemed maintenance charges of the trust estate in preference to any other claims thereupon.

12. The Lumber Company and the Mill Com-

pany may execute notes or may renew existing notes or renew renewal notes for their indebtedness and such other notes or renewals shall have the same right hereunder as have the claims of the creditors in their present form.

13. The Trustee may, but shall not be required to, pay interest accruing upon the interest bearing claims of the creditors, if it has the money in the trust estate which it deems not required for other purposes; provided, however, that any such interest payment shall be pro-rated among all the creditors holding interest bearing claims.

14. The creditors agree that neither this instrument nor anything done or to be done in pursuance of its provisions shall be construed as a preference to any creditor, or any act of bankruptcy but that it is entered into in pursuance of a plan which is considered equitable between all the creditors of the Lumber Company and the Mill Company and which will secure the most advantageous disposal of their property for the benefit of their creditors. The creditors likewise agree that while this instrument remains in effect and no provision hereof is violated, they will not sue the Lumber Company or the Mill Company in any court on their demands nor commence any bankruptcy or receivership proceedings against them. They understand

and agree, also, that the Lumber Company and the Mill Company would not have executed this instrument and that the Trustee would not have consented to act as Trustee hereunder or to assume the obligations herein assumed by it, except upon the express agreement of the creditors in this section contained.

15. The Trustee may select and employ in and about the execution of the trust suitable agents and attorneys and it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent or attorney; if reasonable care has been exercised in the selection, and shall not be held liable for any loss or damage not caused by its own negligence or default. Neither shall it be held to have agreed to pay or be liable for any loss or damage occasioned by its failure to pay any tax, assessment, indebtedness or lien upon the trust estate, save and except the taxes, indebtedness and charges which in the tenth section hereof it has expressly agreed to pay.

16. It is understood that the Central Warehouse Lumber Company of Minneapolis, Minnesota, has advanced to the Lumber Company a sum approximately Thirty-two Thousand ($32,000.00) Dollars under an agreement whereby the amount of such advancement shall be repaid in whole or

in part in lumber, and it is agreed that said Trustee shall recognize said contract and carry out and perform the terms thereof notwithstanding any contrary provision herein contained. It is also agreed that if there should be any other outstanding contracts of similar nature entered into by the Lumber Company or the Mill Company, the Trustee may, in its discretion and according to its best judgment carry out the terms thereof or make such adjustment thereof as it may seem just and proper.

17. If at any time during the continuance of the trust any tax charge or indebtedness shall accrue which would be a lien or charge upon the trust estate superior to the claims of the parties hereto and which, in the opinion of the Trustee, it is to the best interest of the parties hereto be paid, then the Trustee may, but shall not be required to, pay any tax, charge or indebtedness and thereupon the amount so paid, together with interest thereon at the rate of six per cent per annum from the date of payment shall become a charge upon the trust estate and shall be paid out of the first money available therefrom.

18. The trust hereby created shall terminate (a) upon the payment of all the indebtedness owing by the Lumber Company to the parties to

this agreement; (b) upon agreement of the creditors representing at least a majority in amount of the indebtedness of the Lumber Company and who shall have signed the within agreement, to the effect that the trust shall be terminated and the trust estate reconveyed to the Lumber Company and the Mill Company without liability on the part of the Trustee; or (c) upon the disposition of the entire trust estate and the application of its proceeds as herein provided. The creditors signing the within instrument shall make out and file with the Trustee their claims against the Lumber Company and the Mill Company within sixty (60) days from notice of the acceptance of the within trust by the Trustee. Copies of said claims shall be sent by the Trustee to the Lumber Company and the Mill Company and to each creditor who shall have signed the within instrument and if no objection to same be filed with the Truetee within thirty (30) days thereafter, then such claim shall be allowed by the Trustee as filed. The proceeds of the trust estate, after reimbursing the Trustee for advancements, expenses, compensations and other claims mentioned herein, shall be distributed pro rata among the creditors of the Lumber Company and the Mill Company. Upon the termination of the trust and an accounting by the Trustee with the Lumber Company and the

Mill Company and the creditors, and the reimbursement of the Trustee for all sums expended or loaned by it hereunder its trust estate shall be reconveyed to the Lumber Company and the Mill Company.

19. The compensation of the Trustee and the expenses and advancements made by it shall constitute a charge upon the trust estate superior to the indebtedness of any party secured hereby and the Trustee may not be removed nor be deprived of the trust estate in any manner until the payment of its compensation, expenses and advancements have been fully provided for; provided, that upon the failure of the Trustee to accept the trust hereunder and upon its refusal to act after its acceptance, the creditors who have signed this instrument, holding a majority in amount of the indebtedness of the Lumber Company, may by deed appoint a new Trustee.

The Lumber Company and Mill Company agree that they will execute such further and additional conveyance, undertakings and agreements as shall be necessary to fully effectuate the intent of this instrument and best title to all of their property in the Trustee, in trust for the uses and purposes herein provided.

Several copies hereof may be executed and de-

livered and each copy which is duly executed and delivered shall be treated for all purposes as an original instrument.

20. This instrument shall not take effect until creditors representing ninety per cent in amount of the indebtedness of the Lumber Company have attached their signatures hereto and until the holder of the Trust Deed on the property of the Mill Company, which Trust Deed is due, has extended same for a period of two years from date; provided, however, that the debt represented by the Trust Deed shall pro rate with the other creditors who have signed the within instrument as to all distribution of dividends after one year from date hereof.

21. It is further agreed that this instrument shall not take effect until said stockholders shall cause a meeting of the stockholders of said Lumber Company and said Mill Company, to be held immediately, at which the resignations of the present Secretaries and Treasurers of the two companies shall be obtained and also the resignation of one of the Directors of each of said companies, and that Siegmund Katz, of Chicago, Illinois, shall be elected by said stockholders of said Lumber Company and said Mill Company, a Director and Secretary of each of said companies, and provided,

further, that said Katz or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument, shall name, shall be elected and retained as such Director and officer of such Lumber Company and such Mill Company until the trust created by the within instrument shall be terminated.

It is specifically agreed that the claim of the Shoshone Lumber Company for the sum of Five Thousand ($5,000) Dollars and interest represents the purchase price of timber on which a vendor's lien is retained by the said Shoshone Lumber Company, until the payment of said purchase price and it is agreed that said claim will be paid by the Trustee within six (6) months from date hereof as a preferred claim.

23. It is further agreed that the claim of the Idaho Timber Company is secured by the ownership of the following mark placed upon certain White Pine and Spruce logs landed upon Marble Creek (certain marks here described). Any such logs hereafter delivered to the Lumber Company or to the Mill Company shall be paid for by the Trustee at the rate of Sixteen Dollars per thousand feet board measure for White Pine logs and Six Dollars per thousand feet for Spruce logs and the amount thereof shall be deducted from the claim of the Idaho Timber Company. The balance

of said claim shall pro rate with the other creditors in accordance with the terms of this instrument.

In witness whereof the parties hereunto have set their hands and affixed their corporation seals the day and year first herein written.

This was first signed by the bankrupt, Dryad Lumber Company, and Mechanics Loan and Trust Company, and under separate endorsement was signed as follows:

The undersigned creditors of the Stack-Gibbs Lumber Company and the Dryad Lumber Company to the amounts set opposite their names, hereby become parties to and agree to all the terms and conditions of the foregoing Deed of Trust.

Dated February 1st, 1916.

Creditors	Amount of Claim
Merrill, Cox & Company	$221,250.00
Fort Dearborn National Bank	107,000.00
I. F. Searles	55,000.00
First National Bank, Lincoln	12,500.00
Exchange National Bank, Spokane	6,000.00
Shoshone Lumber Company	5,000.00
Idaho Timber Company	60,000.00
S. H. Hess	30,000.00
J. K. Stack	110,000.00
Genevieve Hess Tolerton	20,465.56
Mamie A. Gibbs	12,725.00

The record discloses that the Mechanics Loan & Trust Company is simply a subsidiary concern of the Exchange National Bank and is practically owned by Coman—the same officers and directors of the Mechanics Loan & Trust Company being the officers and directors of the Exchange National Bank (215).

Various and sundry things were done thereafter and until the 29th day of July, A. D. 1916, at which time a petition of bankruptcy was filed against the Stack-Gibbs Company and upon adjudication following in due course, it appeared that not only had every statement as to assets and liabilities of the Stack-Gibbs Company been false, but that the company then was and long had been utterly absolutely insolvent. In due course of administration the assets were, by the Trustee in Bankruptcy, converted to cash, which cash now remains in the hands of the Trustee undistributed.

During the course of proceedings before the Referee, the Mechanics Loan & Trust Company filed a petition praying that the sum of $100,000.00 which had been loaned to the Stack-Gibbs Lumber Company by the Exchange Bank upon notes aggregating an amount of $90,000.00 given by the Stack-Gibbs Company to the Mechanics Loan & Trust Company and by the Mechanics Loan & Trust Company endorsed *without recourse* and delivered to

the Exchange National Bank, which said last mentioned bank discounted the notes, applying the proceeds thereof to the account and credit of the Stack-Gibbs Company, and the further notes aggregating $10,000.00 executed by the Stack-Gibbs Company and made payable direct to the Exchange National Bank, be declared to be a first and prior lien upon all the moneys and assets in the hands of the Trustee, basing and predicating said claim for priority upon the Minneapolis contract, which is hereinbefore set forth (7).

Without undertaking at this time to specify the various incidents upon which this statement is based, the record discloses that little, if anything, was done by the Mechanics Loan & Trust Company, or anyone in its behalf, with respect to the matters and things required of that concern in and by the said agreement.

Further, that numerous other creditors of the Stack-Gibbs Company who had not signed the Minneapolis contract, had claims which, of necessity, could not be subordinated to the claim of the Mechanics Loan & Trust Company. Perceiving these things and the difficulties encountered by the fact that the Mechanics Loan & Trust Company loaned no moneys to the Stack-Gibbs Company under the terms of the Minneapolis contract

or otherwise, the Exchange National Bank filed a petition concurring in the petition of the Mechanics Loan & Trust Company, which said petition of the Exchange National Bank prayed, among other things "that the claim of said Mechanics Loan & Trust Company hereinbefore filed in said cause for the sum of $101,162.91 be allowed to the Mechanics Loan & Trust Company, and that it have a preference as prayed for therein and that all dividends therein be paid to the Mechanics Loan & Trust Company," which said petition is set forth at large at page 22 of the record, and proceeds upon the theory, as will be observed, that the Exchange National Bank loaned and advanced the said $100,000.00 to the said Stack-Gibbs Lumber Company at the special instance and request of the several parties executing the Minneapolis contract but for which said contract the Exchange National Bank would not have advanced said moneys at the request of the Mechanics Loan & Trust Company and the other parties signing said contract—that the notes given to the Exchange National Bank have been delivered to the Mechanics Loan & Trust Company for the purpose of filing and establishing its claim for the benefit of and on behalf of the Exchange National Bank, and asks that in the event it is determined that the Mechanics Loan & Trust Company for the benefit of the Exchange National

Bank is not awarded a lien upon all of the assets of the Stack-Gibbs Lumber Company in the hands of the Trustees, *that the dividends of the various creditors who executed the Minneapolis contract be directed by the court to be paid to the bank to the extent of its claim of* $100,000.00 (22).

Considerable testimony was taken on behalf of all parties to the controversy, as the result of which an order was entered by the Referee which, while denied the right of either of the Exchange National Bank or the Mechanics Loan & Trust Company to establish a lien upon all of the assets of the Stack-Gibbs Lumber Company, decreed that the Mechanics Loan & Trust Company *"be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons* (naming the signers of the Minneapolis contract, including appellants) *until the full amount of* $101,162.91 *is paid;* said payment be made before any moneys whatsoever of said estate be paid in liquidation or satisfaction as dividends or otherwise, of any of the claims of the above named creditors and signers of said trust agreement or any of them; that is, that said sum be a first lien upon the dividends of said signing creditors until the same is fully paid" (64).

Further, that the petition of the Exchange Na-

tional Bank of Spokane, Washington, be and the same is hereby granted with this modification, to-wit, "that all sums hereinafter found to be due and payable to said Mechanics Loan & Trust Company shall be paid jointly with said Exchange National Bank of Spokane, Washington."

As hereinbefore stated, the order last quoted from is that which forms the basis of this appeal.

I.

The Court is met at the threshold of this case by the question of jurisdiction, and must, as we view it, determine whether the Federal Court sitting in Bankruptcy has the power to enter, over the protest and objection of those effected thereby, an order of the character of that appealed from.

It is our contention that while obviously the Court has the right to determine the extent and validity of the claim of the Mechanics Loan & Trust Company for a first and prior lien upon all of the assets of the Stack-Gibbs Company, that power having been extended by the Acts of Congress; that upon the determination by the Court of the fact that the Mechanics Loan & Trust Company did not, as by it prayed for, have a first and prior lien upon all of the assets of the Stack-Gibbs Company in the hands of the Trustee, that

then and at that instant it was stripped of any power or authority to go beyond that point and decide a question, not an incident to the bankruptcy proceedings which did not involve the marshalling and distribution of the assets of the bankrupt, but which, on the contrary, determined independent controverted facts arising between parties not to the bankruptcy proceedings and in which the Trustee was not involved, but which existed between parties then before the Court only incidentally for the purpose of protecting the estate against unwarranted claims for lien, who, by reason of the assumed exercise of authority on the part of the Referee, were deprived of the constitutional right of trial by jury.

This, we charge, was done and in this the authority of the Federal Court sitting in Bankruptcy was exceeded when the Referee ordered that the dividends which otherwise would be payable to the signers of the Minneapolis contract, including appellants, be paid to the Exchange National Bank and Mechanics Loan & Trust Company.

The Federal Court sitting in Bankruptcy is a court of limited jurisdiction.

See:

Taft vs. Century Savings Bank, 15 A. B. R. 597, 141 Fed. 396 (C. C. A., Ia.).

"The District Court as a court of bankruptcy is undoubtedly a court of limited jurisdiction."

Also:

Edelstein vs. United States, 149 Fed. 636 (C. C. A. 8th Circuit), page 638.

"It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which we may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy specifically made subject to its jurisdiction by Section 2 of the Act."

In re Columbia Real Estate Company, 101 Fed. 965, page 970.

(Decision by Judge Baker, now presiding Justice of the United States Court of Appeals for the Seventh Circuit—Appeal dismissed—112 Federal, 643.)

"It is true the Bankruptcy Court is one of limited jurisdiction * * *."

In re Billing, 145 Fed. 395, page 400.

"The District Court of the United States is a Court of limited but not inferior jurisdiction."

The only powers which it may assume to exercise are those specifically enumerated in the Acts of Congress or which may be inferred from the general provision found in the Act, Section 2, Subdivision 15, which is the grant of power "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of this Act."

Obviously the Court may determine, and in a summary manner, the rights of all claiming an interest in the property coming to the possession of the Trustee, as the Act provides (Section 2, Subdivision 7), that the Court shall "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It is not necessary for us to base our contention upon the point that the Court exceeded its authority in entering the order directing the diversion of dividends otherwise payable to appellants, to the Exchange National Bank and Mechanics Loan & Trust Company purely upon reasoning, as several of the Federal Courts have passed upon this subject.

Judge McPherson, District Judge, sitting in the Eastern District of Pennsylvania in the case of

Re Girard Glazed Kid Company, 136 Fed. 511,

held that the Federal Court would not concern itself in a controversy between two contesting claimants over dividends to be declared by that Court.

Speaking of the conclusion reached by the Referee in the controversy, the Judge in his opinion says:

> "But I agree with his conclusion that the equities between Barbara Swartz and Clara Illingsworth cannot properly be adjusted in this proceeding by deducting from the dividend payable to the former a sum that will make good to the latter the amount which she would have received under the agreement of January 20, 1903, if her claim had not been wrongfully reduced on the bankrupt's books. This is a dispute that has nothing to do with the bankruptcy proceedings, nor with the ascertainment of the true amount of the claim. It is a controversy growing out of a transaction that took place between two persons before the petition was filed, and concerns a sum of money that came into Barbara Swartz's possession at that time, and has remained in her possession since. It is an independent controversy about the ownership of money that

> is not a part of the fund for distribution, and this court cannot take jurisdiction of the dispute and decide it in the roundabout manner that has been suggested. If Barbara Swartz has the money in her possession that belongs to Clara Illingsworth, *ex aequo et bono,* the proper tribunal is open for an appropriate suit. To take other money from the former, and decree it to the latter in this proceeding would be to confuse two distinct and separate suits having nothing to do with each other. Of the action in bankruptcy the district court has jurisdiction; but it has no jurisdiction of a suit to recover from Barbara Swartz any excess of payments that she may have received under the agreement of January 20, 1903. Such a suit is not involved in the settlement of the bankrupt estate."

What is said with respect to the denial by the Federal Courts of the right to garnishee dividends in the hands of the Trustee in bankruptcy applies equally as well to the controversy before this Court.

The case of Re Hollander, 181 Fed. 1019, conceded without question the right of the Federal Court to pass upon claims for liens upon moneys in the possession of the Court, but points out the pitfall resulting from contests between those having

separate controversies over the dividends themselves. There it is said that—

> "Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions. But where, as in this case, the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend. In re Kohlsaat, 14 Fed. Cas. 833. If it be clear, as above stated, that the court has no legal right to do what is asked, it is quite as certain that it would be very unfortunate, from a practical standpoint, if the rule of law were otherwise. If the specific relief asked for in this case could be granted, every person who had obtained a judgment, not only in a court of record, but before a justice of the peace, for any sum, however small, against any one who was entitled to a dividend in a bankruptcy case, could come into this court to obtain payment out of such dividend. He would likely, in many cases, be met by claims of

> assignees, who would assert that the dividend has been assigned to them prior to the date of the recovery of the judgment. This court would be called upon to pass upon many cases of small importance, but likely to be bitterly contested and over which it was never contemplated it should have any jurisdiction."

The Hollander case, as cited, was approved by the Circuit Court of Appeals for the 7th Circuit.

In the case of In re American Electric Telephone Company, 211 Fed. 88, page 90, in a decision by Judge Kohlsaat, which, in denying right to garnishee, held:

> "The main question here presented is whether or not it was error for the District Court to permit the introduction into this bankruptcy proceeding of an independent and entirely irrelevant matter. For respondent it is claimed that by analogy the law and practice relative to permitting suits against receivers is applicable to trustees in bankruptcy. If this be so, then the District Court has the power, in its legal discretion, to permit the garnishment of the trustee. Undoubtedly the bankruptcy court has power to permit suit against its trustee or receiver with reference to liens upon or title to specific property claimed by the

trustee. This, however, is not such a case. Here the respondent sought to create a lien. The effect is to inject into the bankruptcy proceedings a suit to enforce payment of a claim against a creditor of the bankrupt, a matter in which the trustee was not concerned and one neither covered nor contemplated by the Bankruptcy Act. Clause 2 of Sec. 47 of the Act of July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), requires the trustee to 'close up the estate as expeditiously as is compatible with the best interests of the parties in interest.' Clause 9 of said section directs the trustee to 'pay dividends within ten days after they are declared by the Referee.' It is apparent that any attempt to adjust the rights of a creditor of the bankrupt as against the right of one seeking to enforce a claim against the creditor's dividend must, when carried out to its logical result, place an additional burden upon the bankruptcy court and work a delay in the settlement of the estate. It is conceivable that garnishment proceedings may be prolonged for years, so that the court may be congested with unfinished business which in no way concerns the bankruptcy cases so remaining undisposed of, thus becoming an independent collection tribunal, whereas it was

the purpose of the act, as stated in Wood vs. Wilbert, 226 U. S. 384-387, 33 Sup. Ct. 125, 127, 57 L. Ed. 264, 'to secure an equality of distribution of the estate of the bankrupt among his creditors.' In the present case, the rights of Grant, as assignee of Lyman, are involved and would have to be adjusted.

As long ago as 1879 it was held (In re Cunningham, Fed. Cas. No. 3,478) that garnishment of a dividend in a bankruptcy cause could not be entertained; that it would work delay; that the court knew no law or usage which would justify the court in making an order directing the assignee (trustee) to pay the creditor's dividend to the party garnisheeing, as a matter of comity.

In re Kohlsaat, Fed. Cas. No. 7,918, the court refused to give leave to attach the dividend of a creditor of the bankrupt on the ground that it was 'no part of the province of this court to become the stakeholder for parties litigant in a state court.' 'Whereas, in this case,' says the court in Re Hollander (D. C.), 181 Fed. 1020, 'the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the

creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend.'

The Circuit Court of Appeals for the Ninth Circuit, in Re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, held, in a case similar to the present, that 'the right to garnishee funds in *custodia legis* must depend upon express statutory authority,' and that 'the distribution of the assets of the bankrupt, therefore,' cannot be stayed or prevented by the process of a state court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation.''

That the reasoning set forth in the case just quoted from applies to the case at bar, will be fully observed when we point out to the Court, as we do here, the fact that practically a year has been consumed in the contest of the claim of the Exchange National Bank and the Mechanics Loan & Trust Company for the dividends which would otherwise be payable to appellants, during which, not only has the Federal Court sitting in bankruptcy been delayed in the administration of the affairs delegated to it by the Acts of Congress, but the prompt distribution of the assets of the

estate of the Stack-Gibbs Company has been thereby prolonged and delayed, all of which we respectfully contend is contrary to the intent and purpose for which the Bankruptcy Rct was passed.

In addition to what we have said, we wish also to cite the case of Stires vs. First National Bank, 119 N. W. Rep. 258, in which it is held:

> "A contract between two creditors of a common debtor wherein one agrees that a debt owing to a third creditor may be preferred by the debtor, if purchased by the other contracting creditors, does not amount to an assignment of the first party's debt, nor of the dividends declared thereon in subsequent bankruptcy proceedings."

The question immediately arises upon the determination of the controversy presented by this record adversely to the Mechanics Loan & Trust Company and the Exchange National Bank in so far as their claim for a lien upon all of the assets of the bankrupt in the hands of the Trustee is concerned, and confirming title in the Trustee, may the claimants require, after having failed in the primary object and purpose of their controversy, the exercise of powers neither incidental to the authority bestowed by the Act nor germane to the principal

feature of the controversy in which they have been defeated?

As we prepare to submit this brief, our research convinces us more strongly that the order appealed from is the outgrowth of a situation never clearly defined, but which is more nearly, and we might add, more frequently, presented by a bill in equity which seeks relief upon some ground or another and which for want of equity or insufficient evidence, must be denied or dismissed, the complainant to save the life of his bill engrafts upon it a controversy which otherwise but for the pending proceeding, would be subject to independent proceeding either at law or in equity.

And the question arises, may life be instilled by the interjection of a controversy, the determination of which is not essential to the relief sought in the original proceeding, or which is necessary for determination by a different tribunal?

Many cases are found upon the subject, a few of which we wish to cite and to quote from.

In deciding that the Mechanics Loan & Trust Company and the Exchange National Bank were not entitled to a first and prior lien upon the assets in the hands of the Trustee, the Referee had necessarily to determine that as the Trustee stood in the position of a creditor armed with process, the

Minneapolis contract was as to the Trustee, null and void. Bearing this in mind we wish the Court to consider the case of

> Denny vs. McCown, 34 Oregon 47; 54 Pac. 954,

in which a bill had been filed to foreclose a mortgage, which because of defects, was held to be void, and therefore not subject to foreclosure. Upon the determination of this point, plaintiff asked that judgment might be entered for the amount of the indebtedness secured by the mortgage. Thereupon, the trial Court proceeded to enter judgment upon presentation to the Supreme Court of Oregon, that tribunal held in reversing the decree and dismissing the suit that:

> "The rule that a court of equity, obtaining jurisdiction of a cause for one purpose, will retain it until complete justice is administered, can have no application to the case at bar; for, the jurisdiction to foreclose the trust deed being dependent upon the existence of the lien, it could not be legally exercised, on account of the validity of the instrument, and, the plaintiff having a complete and adequate remedy at law upon the note, the court was

> powerless to award a money judgment thereon."

Another Oregon case is found reported (Dodd vs. Home Mutual Insurance Company), 22 Oregon, 3, 28 Pac. 881, in which a bill for specific performance was filed seeking the delivery of a policy of insurance in which it was held that no agreement to deliver a policy had been shown. There the plaintiff had sought to retain the jurisdiction of the Court for the purpose of awarding damages, but in denying that right, the Supreme Court of Oregon held:

> "But the plaintiff contends that, having proceeded thus far with this inquiry, and having reached a conclusion adverse to him on the equitable aspects of this case, we ought to retain the case, and determine the questions of fact upon which the defendant's legal liability may be supposed to depend. There is a numerous class of cases where, if equity takes jurisdiction for one purpose, it will retain the cause for all purposes, and administer complete relief; but, having found against the plaintiff's equity that rule has no application. If we had found that the defendant agreed to issue the policy, and had refused, we might have decreed specific performance; and then

> we could, as incident to the equitable relief to which the plaintiff would have been entitled, have ascertained the amount of plaintiff's loss, and decreed that defendant pay the same. Insurance Co. v. Ryland, 69 Md. 437, 16 Atl. Rep. 109. But, where the equity entirely fails, we think it better to dismiss the suit, and leave the party to pursue such legal remedy, as he may be advised."

In the case of Wiggins vs. Columbian Fireproofing Company, 227 Pa. 511, 76 Atl. 742, in which to stay various suits at law, a bill was filed by building contractors against the estate upon which the building was erected, the tenants, patent holders and architect asking a determination of the party's respective liabilities and enjoining said suits at law against the builders, it was held that the bill should have been dismissed as against the tenants since the plaintiffs and the other defendants had no concern with the controversy between the tenants and the estate. That portion of the decision pertinent to the issues of this case is as follows:

> "The first of the appeals suggests many questions; but the only one which it is important to consider arises out of the complaint that the court below fell into error in assuming jurisdiction of the bill as to the appellants,

as they were thereby deprived of their right to trial by jury. The contention on the other side is that all of the matters in dispute were so interlaced that it was practically impossible, or certainly difficult and inconvenient, to dispose of them separately, and on that ground, and to avoid a multiplicity of suits, the bill should be sustained.

The plaintiff and the other defendants had no real concern with the points in dispute between these appellants and their landlords, and those questions in no way so intermingled with the questions in controversy between these other parties as to give any sufficient reason why they should be drawn out of their regular course at common law into this equity proceeding. There was no inadequacy in the remedy at law which had been invoked against the appellants, nor was there any great convenience to be served, or inconvenience to be avoided, by forcing their case into equity. The bill should have been dismissed as to these appellants."

The Supreme Court of Illinois in the case of Brauer vs. Laughlin, 235 Ill. 265, 85 N. E. 283, upon appeal from a decision in which a bill for specific performance of a contract had been filed

in which proceeding it was ultimately held that, although the allegations in the bill authorizing a court of equity to take jurisdiction of the case for the purpose of granting the relief prayed for, the evidence was insufficient to sustain the allegations of the bill, the Court found:

> "The rule is well understood that a party cannot resort to equity for relief when he has a complete and adequate remedy at law. This rule is not disputed by appellee, but it is contended that as the bill to which appellant filed an answer contained allegations which, if sustained, entitled complainant therein to equitable relief, the court properly retained the bill, and, notwithstanding the proof failed to sustain the allegations upon which complainant relied for equitable relief but did show that appellant was indebted to Sarah Eden for money borrowed, the court properly retained the bill and entered a decree in favor of the complainant therein, and against appellant, for the amount of money so found due, notwithstanding a recovery might have been had in an action at law. In Toledo, St. Louis and New Orleans Railroad Co. v. Railway Co., 208 Ill. 623, the court said (p. 632): 'While it is true that a court of equity which has jurisdiction of a cause by reason of the existence of

some ground of equitable jurisdiction, for the purpose of doing complete justice between the parties, may, in addition to the equitable relief, afford relief of a character which in the first instance is only obtainable in a suit at law, still, to authorize relief of the latter character, some special and substantial ground of equitable jurisdiction must be alleged in the bill and proved upon the hearing. Mere statements in a bill upon which the chancery jurisdiction might be maintained but which are not proved will not authorize a decree upon such parts of the bill as, if standing alone, would not give the court jurisdiction.' The Supreme Court of the United States said in Dowell vs. Mitchell, 105 U. S. 430: 'The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out, cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.'—citing authorities. In Carlson v. Koerner, 226 Ill. 15, this court said (p. 21): 'The mere allegation of irreparable injury, while it may be sufficient to give a court of equity jurisdiction upon the face of the bill, is not sufficient upon

the final hearing unless sustained by proof.' This rule is sustained also by 16 Cyc. 111, Tiernan v. Granger, 65 Ill. 351, and cases cited by the court in Toledo, St. Louis and New Orleans Railroad Co. v. Railway Co., *supra,* and which need not be again here cited. No reason appears, either from the proof or decree, why the remedy of Sarah Eden was not as complete and adequate in a proceeding at law as in a suit of equity.

The recovery here allowed is upon a purely legal demand, and if an action had been brought at law, either of the parties would have been to a jury on the trial. Courts will not permit parties to sue in chancery, and upon failure to establish any basis for equitable relief have the bill retained for the purpose of a recovery upon a purely legal demand. To allow this to be done would be to deprive the dependant of his constitutional right of trial by jury. We said in County of Cook v. Davis, 143 Ill. 151 (p. 154): 'Where a court of law is competent to afford an adequate and ample remedy, courts of equity will remit the parties to the courts of law, where the right of trial by jury is secured to them. In such cases either party has a right to demand that the matter of the defendant's liability be sub-

mitted to a jury according to the course of the common law, and unless some special and substantial ground of equity jurisdiction be alleged, and, if necessary, proved, such as that a lien exists for the money demand which can not be adequately enforced at law, or that discovery is necessary to a recovery by complainant, or other like equitable considerations affecting the adequacy of the remedy at law, courts of equity will decline to interfere. These principles are familiar to every lawyer, and have frequently received approval in this court —Taylor v. Turner, 87 Ill. 296; Victor Scale Co. vs. Shurtleff, 81 id. 313; Gore v. Kramer, 117 id. 176; Buzzard v. Houston, 119 U. S. 347; Russell v. Clark, 7 Cranch, 69.' We have held that a court of chancery has power, where any equitable conditions exist authorizing it, in order to do complete justice between the parties, to enforce legal as well as equitable rights, but the equitable conditions authorizing it depend upon the proof and not upon the bare allegations of the bill.

Sarah Eden having failed to prove any allegations of her bill which authorized a court of equity to take cognizance of it, the chancellor erred in retaining it for the purpose of enforcing purely legal rights."

To the same effect is the case of Fulton vs. Fisher, 239 Mo. 116, 143 S. W. 438, page 443:

> "Suits in equity are proceedings in personam. Therefore, when the court lawfully acquires jurisdiction of the persons, it may adjudge their property rights regardless of where the property is situated. But it does not follow that, because the court has acquired lawful jurisdiction of the person for one purpose, it may, in that suit, hold him to answer for another matter. For example, Mr. Fulton, a resident of the State of Pennsylvania, is made a party defendant to the suit concerning certain coal lands in Ohio, in which suit he is interested only as a member of the syndicate or as a creditor of that syndicate. He comes from his home in Pennsylvania and enters his appearance, whether voluntarily or under stress of the order of publication it is immaterial, to defend his interest in that suit. Then advantage is taken of his appearance here to serve him with a copy of a so-called cross-bill that relates entirely to other matters involving large interests. Can it be said the court has thus acquired jurisdiction of him for that purpose? He appealed to the court for relief; but the court overruled his demurrer, and he found himself in a position

where he must either let the cross-pleader take judgment against him or answer, and so he answered. It does not clearly appear from the record whether Fulton was here in person or entered his appearance to Jones' suit by attorney; probably the latter, because, if he was here in person, it would perhaps have resulted in an independent suit against him, which would have a different aspect. There was no new suit instituted, no writ served. It was only an effort to tack on to Jones' suit another entirely different suit.

Here Fulton was unconditionally in court for all the purposes of the Jones suit, subject to its judgment, and entitled to its protection. His complaint now is, not that the court had not jurisdiction of his person, but that it used its jurisdiction to force him to answer in another suit. We hold that the court did not acquire jurisdiction of the subject of the West Virginia controversy by the means pursued, and that by answering the amended cross-bill Fulton did not give such jurisdiction.

The doctrine is also invoked that equity, having gained jurisdiction of a cause, will carry it on until complete justice is done either in law or in equity. But that doctrine does

not go so far as to say that a court of equity, having acquired jurisdiction of one cause of action, will extend its jurisdiction to embrace other subjects of litigation of different character and between different parties. The learned trial judge himself recognified that he had on his hands two entirely different suits, and therefore, when he sent the cause to a referee, he ordered that one suit should be tried first and nothing done in the other until the final report on the first. The report that came in in that case disposed of the whole of Jones' original suit, and that suit was then ready to progress to final hearing before the chancellor; but the plaintiff arrested that progress by dismissing his suit.

We hold that the dismissal of that case carried the amended and supplemental cross-bill and all pleadings relating thereto out of court."

In the case of Davis vs. City of Silverton, 47 Oregon, 171, 82 Pac. 16, his Honor Judge Wolverton, then Chief Justice, in reversing a decree of the Circuit Court and dismissing the bill of complaint filed for the purpose of enjoining the collection of a special assessment and collecting damages, said:

"Plaintiff, however, asks for damages for

the encroachment upon her premises as a part of her relief here. Being recoverable at law, it could have no place in an equitable proceeding, unless germane to the suit or growing out of the proceedings complained of. It is a familiar rule that, if equity acquires jurisdiction for one purpose it will retain the cause for all purposes, and administer complete relief. The rule, however, does not operate to give the court jurisdiction to administer relief at law where the equity fails. Love v. Merrill, 19 Ore. 545, 24 Ore. 916; Dodd v. Insurance Company, 22 Ore. 3, 28 Ore. 881, 29 Pac. 3; Whelan v. McMahan (just decided), *infra*. Such is the precise condition here. Plaintiff has failed in her main purpose—that of enjoining the collection of the assessment. The proceedings for the improvement being regular, and plaintiff having so failed, her equitable remedy is extinct. She might have had her relief to enjoin an encroachment and trespass while in the act, if the city was guilty of the like; but, the act having been accomplished, her remedy is to repossess herself of the property and sue for damages. For this she must be remitted to her action at law."

The Circuit Court of Appeals for the Eighth Circuit in the case of Lewis Publishing Company

vs. Wyman, *et al.*, 182 Fed. 13, recognizes the same principle laid down in the cases quoted from and in that decision (page 18) quoted from the case of Mitchell vs. Dowell in the Supreme Court of the United States, which case is cited also by the Supreme Court of Illinois in the case hereinbefore referred to.

> "True, when involved in a suit of which a court of equity has jurisdiction, matters of legal cognizance may be disposed of if incidental to the equitable relief that is granted. But it appears here that at the instance of complainant the case it had in court assumed such a phase that no injunction or other equitable relief could be granted. It is as though complainant had amended its bill by withdrawing all averments calling for the interposition of a court of equity. Under such circumstances a court should not retain the case for purposes purely legal. In Mitchell v. Dowell, 105 U. S. 430, 26 L. Ed. 1142, the court said: 'The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.' "

In the case of Linden Investment Company vs. Honstain Brothers Company, 221 Fed. 178, an appeal had been taken from a decree granting relief upon a bill for Mechanics' Lien which, while not established for want of equity, had sought an accounting for moneys due. The Circuit Court of Appeals held:

> "Counsel for the plaintiff argue that the court below should determine and give judgment upon the claim of the plaintiff for the amount it alleges the Investment Company owes it on account of the construction of the Mowbray elevator. But the right to the establishment and foreclosure of the alleged mechanics' lien upon this elevator is the only ground of equity jurisdiction invoked by the second cause of action which is independent of the first and relates solely to the mechanics' lien upon that elevator. And as that ground does not exist there is no jurisdiction in equity of that cause of action remaining. The plaintiff's claim to recover the amount it asserts the defendant promised to pay it for the erection of the Mowbray elevator is a purely legal cause of action, upon which the defendant has the right to a trial by jury under the Acts of Congress (Revised Statutes, 723), and when upon the hear-

ing of a suit in equity the right to all equitable relief upon an independent cause of action entirely fails the court of equity is without jurisdiction to retain the cause and try issues at law and grant incidental or other relief thereon. Mitchell v. Dowell, 105 U. S. 430, 432, 26 L. Ed. 1142; Russell v. Charle's Executors, 7 Cranch, 69, 3 L. Ed. 271; Kramer v. Cohn, 119 U. S. 355, 357, 7 Sup. Ct. 277, 30 L. Ed. 439; Alger v. Anderson (C. C.), 92 Fed. 696, 710; Lewis Publishing Co. v. Wyman (C. C.), 168 Fed. 756, 762."

A most interesting decision has been handed down by the Circuit Court of Appeals for the Fourth Circuit in the case of Henry vs. Henderson, 145 Fed. 316, in which a petition was filed in bankruptcy by one seeking to enjoin the trustee in bankruptcy from executing a deed of sale to one who had purchased real estate at a bankruptcy sale on the ground that he, rather than the purchaser, was entitled to the deed. It was held, after reciting the facts, that:

"Thus it will be seen that this is a controversy between two parties, neither of whom was a party to the proceeding in bankruptcy under which the property was sold. It is a controversy which does not in the slightest

degree affect the creditors of J. B. Henderson, the bankrupt, nor is the trustee in any wise affected. Stripped of all extraneous matters, it appears to be an effect on the part of Henderson to compel specific performance of a contract relating to the sale of land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind. The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., and the act contemplates that any collateral questions growing out of the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted.

We are of the opinion that the court of bankruptcy has no jurisdiction of suits of this character, but, even if this were an effort on the part of the respondent to bring his suit in the Circuit Court of the United States, that court would be without jurisdiction inasmuch

> as it appears from the record that both parties are citizens and residents of the State of West Virginia. We are therefore of the opinion that the District Court was without jurisdiction to hear and determine the controversy between the petitioner and respondent. The case will be remanded, with instructions to dismiss this suit."

Although the record in the case at bar clearly discloses the ample objections made by appellants to the exercise of jurisdiction by the referee to enter the order complained of and for this reason we do not consider the matter of paramount importance, we wish to point out that the Circuit Court of Appeals in the case last quoted from held that though neither party objected to the jurisdiction of the Federal Court at the trial, this was insufficient to justify the Court in assuming jurisdiction to determine the controversy unless the record affirmatively showed that the case presented was within the class of cases of which jurisdiction had been conferred by Congress upon the Federal Court.

From the cases which we have cited upon this subject, we respectfully insist that not only the Referee lacked jurisdiction to award the dividends

upon the claims of appellants to the Exchange National Bank and the Mechanics Loan & Trust Company because of the fact that Congress has not endowed the Federal Court sitting in bankruptcy with a power to pass upon matters of this character which are separate independent controversies between parties with whom the bankruptcy court is not concerned, but that notwithstanding this inherent want of jurisdictional power, the controversy is one which is beside the question the Referee was in the first instance called to pass upon and is in fact a controversy which should be determined by a court of law, and is not an incident to the primary relief prayed for by the Mechanics Loan & Trust Company, and for the reason stated, the order of the District Court, if for no other, should be reversed.

We cannot refrain at this point from calling the attention of the Court to what, in our judgment, appears to have been an oversight on the part of Judge Dietrich in that portion of his opinion, which reads as follows:

> "Neither the creditors referred to in this brief nor the Trustee is complaining of the order under review, by which the Trustee was recognized as having a sort of equitable lien upon the dividends to which the signatory creditors may become entitled."

We do not feel that we should be criticised under the circumstances in advising the Court, as a matter of fact, independent of the record, that the individual who prepares this brief personally argued the matter before Judge Dietrich, and dwelled at length in that argument upon the very question which is discussed in the preceding paragraphs, *viz.,* that the Federal Court sitting in bankruptcy may not, because of inherent want of jurisdiction, declare in favor of another, an equitable lien upon any of the dividends payable to those creditors who file their claims in the usual course, and we say this with every mental assurance, that those gentlemen who will reply to this brief, recognizing what we have stated to be true, will not charge us with reciting facts outside the record, when we state this to be a fact.

In addition to what we have just said, we might, by way of suggesting diminution of record, produce, we assume, for observation by this Court, the very lengthy briefs submitted to Judge Dietrich on behalf of the respective parties to this controversy in which the precise point is raised and extensively discussed.

That it is not necessary for us, however, to go beyond the record with respect to this matter, we wish to point out to this Court the petition for

review from the order of the Referee upon which, together with the certificate for review, the District Judge decided the matter presented, and to quote here paragraph "a" of said petition, which reads as follows (Rec., p. 70):

> "Said Referee had no jurisdiction to pass upon the claim of a preference or lien by the Mechanics Loan & Trust Company and by the Exchange National Bank, or by either of them, to the dividends due or which should be found to be due and declared to these petitioners or to either of them or to determine any rights whatsoever to the dividends to be declared herein as between the said claimant and these said petitioners."

Also paragraph "m" of said petition, which reads as follows (Rec., p. 72):

> "Said Referee committed error in ordering and adjudging that the Mechanics Loan & Trust Company be paid all dividends or moneys that may hereafter be determined by the court to be due and payable to the following persons or corporations signing said Lincoln Trust agreement, to-wit: Merrill, Cox & Company, Fort Dearborn National Bank, I. F. Searle, First National Bank of Nebraska, Shoshone Lumber Company, Idaho Timber

Company, S. H. Hess, J. K. Stack, Genevieve H. Tolerton and Minnie A. Gibbs, until the full amount of $101,162.91 was paid, and in ordering and adjudging that said sum be declared to be a first lien upon the dividends of said respective parties."

It is not for us to explain the reason for the insertion by his Honor Judge Dietrich in his decision of that portion quoted, for that not knowing we cannot do. We must assume, however, in justification of our position, that the District Court did not attach the same importance to the question under discussion as appellants feel the matter should be given.

II.

We wish to call the attention of the Court to that provision of the Minneapolis contract which appears at paragraph 10 thereof, and which reads as follows:

> "The Trustee shall advance such sum of money as it deem necessary to meet the payroll of the Lumber Company and the Mill Company, and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand ($100,000.00)

> Dollars, and the Trustee shall have a first and preference claim upon said trust estate for the amount of such advancement."

Inasmuch as the Mechanics Loan & Trust Company was designated as Trustee, clearly the provision quoted from referred to that concern and to no other, and it now is and always has been the contention of the appellants that the Exchange National Bank cannot lawfully, for the purpose of securing the benefit of the security pledged, create in its favor a lien either upon the assets in the hands of the Trustee or upon the dividends payable to appellants by calling upon the Court to so construe that contract as to read into the same the name of "Exchange National Bank" in lieu of the Mechanics Loan & Trust Company, and independent of the testimony of Mr. Coman, we do not believe that counsel for the Exchange National Bank would so contend.

The theory upon which the right of the Exchange National Bank to be substituted as beneficiary under the so-called trust agreement is predicated, is found exclusively in the statement of Mr. Coman reported by him to have been made at the meeting of the creditors at Minneapolis, at or about the time the so-called trust agreement was

prepared. That statement is as follows (Rec., page 277):

> "He (referring to Mr. Fletcher, Vice President of the Fort Dearborn National Bank) wanted to know what the responsibility of this trustee was, and I stated that while the capital was only Ten Thousand ($10,000) Dollars, that through an arrangement with the bank (Exchange National Bank) we could get the money to carry out the terms of this contract."

(The record not only shows an objection to the question calling for the testimony quoted, but in addition thereto a motion to strike, both of which are most ample in their specifications.) (241 to 245-276.)

Therein and upon this testimony lies the right, if any, of the Exchange National Bank to stand in the shoes of the Mechanics Loan & Trust Company.

That the Referee erred in admitting the evidence complained of, we have little doubt. And our convictions on this subject are, we believe, fully sustained by a multitude of authorities, only a few of which we deem necessary to quote from.

American National Bank vs. Harlan, 89 Md. 675, 43 Atl. 756,

reports a suit instituted in the trial Court by the Receivers of the Consumers Meat Company to compel a transfer of a certain leasehold standing in the name of one Schott, as Trustee, alleged to be the property of the Consumers Meat Company.

The appellant, American National Bank, a defendant by answer to the petition, set up the defense that the property was held by Schott as Trustee to secure the American National Bank an indebtedness due it by the Consumers Meat Company and not as Trustee of the latter company.

It appears from the trust deed that the property described was conveyed to "Simon P. Schott, Trustee for the Consumers Meat Company of New Jersey, a body corporate of the second part."

It was sought by oral evidence to show that Schott was in reality the Trustee for the American National Bank, and that it was so understood. Testimony to this effect was excluded by the trial Court, whereupon the American National Bank, who claimed error therefor, appealed. The Court in passing upon the subject held:

> "Nor can such a trust be created for the benefit of a third person, and to defeat a complainant's equity, by an answer alleging declarations or intentions at variance with the expressed intention of a deed. Now, in the

case before us the appellant not only seeks by parol proof to vary and contradict the terms of the deeds, but to substitute itself, an unnamed *cestui que* trust, for the one named in the deed. Mr. Simon P. Schott, the trustee, testified in part to this effect: 'I became the trustee of this property because it was a condition precedent to the continuing of the indebtedness of the said Consumers Meat Company that they should make these deeds to me as trustee, for the purpose of securing the bank against any loss on account of its indebtedness to the bank at that time, or that may occur thereafter; that is, after the making of the deeds the property was to be held as collateral property for the indebtedness of the Consumers Meat Company to the American National Bank.' This evidence is clearly at variance with the expressed intention in the deeds, and was inadmissible for the purpose offered."

In the case of Evans vs. Duncan, 82 Ia. 401, 48 N. W. 922, it was sought by parole evidence to show that the name of a grantee named in a deed was inserted merely as security to him for money advanced by the real purchaser with which to pay for the real estate deeded, the Court held:

> "The deed is absolute and unlimited, both as to guarantee and covenants of the warranty. There is no question but that the general rule is that the terms of a written contract cannot be changed or varied by any prior or contemporaneous or parole agreements."

A similar situation arose in California as reported in the case of Young America Engine Company vs. City of Sacramento, 47 Calif. 594. Inasmuch as the syllabus of the case is the meat of the entire decision, we content ourselves by quoting therefrom as follows:

> "Parol Evidence in Case of Deed.—In any action by a *cestui que* trust against a trustee to enforce the trust, by compelling a conveyance of the legal title to the *cestui que* truth, parol evidence, in the absence of fraud or mistake in making the deed, will not be received on behalf of the trustee, to contradict the language of the deed, and show that the trustee named in the deed, and not the *cestui que* trust, was the beneficiary."

We wish also to cite the case of the Union National Bank vs. International Bank, 22 Ill. App. 652. The case was a foreclosure proceeding.

The appellees claimed under and sought the fore-

closure of a trust deed in the nature of a mortgage made by one Walker to one Rosenthal as Trustee, conveying a parcel of real estate to secure to several appellees an indebtedness of Walker to them, the contest being as to the amount legally due under the trust deed between the Union National Bank and the heirs at law of one Coolbaugh, deceased.

Their relation to the case arose out of a second trust deed by which Walker conveyed to Coolbaugh, as Trustee, the same real estate. The condition expressed in the second trust deed was in these words:

> "This conveyance is made to secure any and all indebtedness of Samuel J. Walker as maker or endorser of any and all notes, drafts or acceptances held by the Union National Bank or negotiated through said W. F. Coolbaugh or any or all renewals of the same or any or all paper that said Walker may hereafter sell to said bank or negotiate through said Coolbaugh."

At the time of Coolbaugh's death, Walker owed him Twenty-two Thousand ($22,000.00) Dollars and was also indebted to the Union National Bank in excess of Two Hundred Thousand ($200,000.00)

Dollars. The pertinent portion of the decision is as follows (page 655):

> "Counsel for appellants offered as evidence the oral declarations and deposition of said Walker to the effect and as tending to prove that at the time of the making of the trust deed to Coolbaugh, it was verbally agreed between him and Walker that it should be held as security for any notes or money due by Walker to Coolbaugh individually as well as to the bank. Upon objection of appellee's counsel, the court excluded the evidence."

After quoting from authorities, the Court held further:

> "The terms of a mortgage cannot be valid by any verbal agreement or understanding of the parties or their acts or conversations prior to or at the time of the execution of it."
>
> (1 Jones on Mortgage, Sec. 96.)
>
> "We are of the opinion that the evidence offered was incompetent. The parties offering it not being strangers and it would have been to alter or vary the condition by parol."

Upon appeal, the decision of the Appellate Court was sustained in the case of the Union National Bank vs. International Bank, 123 Ill. 510.

In the case of Newberry Land Co. vs. Newberry, 95 Virginia, 119; 27th Southeastern, 899, a corporation not named in a deed sought by parole evidence to show that it rather than the one named therein as grantee was the real beneficiary under the transaction; that it, in its own name, might enforce a covenant therein contained. The Court said:

> "The pleader, evidently well aware of the difficulty that confronted the plaintiff in maintaining a suit in its own name and right, sought to obviate it in drawing the declaration by the averment of extrinsic facts. We thus find it averred in the declaration that 'the covenants, promises, and agreements of the parties to the said written contract were made and entered into for the purpose of being continued until after the plaintiff became and was chartered, and that when the plaintiff corporation became and was chartered, that the said contract in writing, with all the covenants, promises, and agreements, should become the absolute property of the said corporation, by operation of said written contract itself'; and that, 'from the time it became a chartered corporation, * * * all the covenants, stipulations, and agreements in the said contract in writing which were made for the plaintiff's

> benefit, or for the benefit of the parties of the first part thereto, or pertaining to them, or either of them, were, by operation of said contract in writing, as well as by the acts of all parties thereto themselves, transferred to and vested in the plaintiff corporation, and the plaintiff is entitled to all the rights and benefits of such covenants, stipulations, and agreements, and that it is now the sole owner of such covenants, stipulations, and agreements in said contract in writing, with the right to enforce them against the defendant.' "

Deciding the law applicable to the case, the Court said:

> "The extrinsic facts, so averred, set up a distinct and contemporaneous parol agreement, tending to vary and contradict the contract on which the action is founded, which testimony would be inadmissible to prove, and upon which the action of covenant would not lie. Their averment in the declaration is an adroit and ingenious attempt to enable the plaintiff to maintain, by means of a collateral parol agreement, the action of covenant upon a sealed contract, to which it was not a party, and which does not show upon its face that it was made for the sole benefit of the plaintiff. It

is plain that this cannot be done."

III.

That the Exchange National Bank is a mere volunteer and not entitled to be subrogated to the security held by the Mechanics Loan & Trust Company is fully established and borne out by the authorities.

The Court will bear in mind that of the total amount of indebtedness claimed to be due by the Mechanics Loan & Trust Company and of the Exchange National Bank, $90,000.00 is represented by notes, executed by the Stack-Gibbs Company, made payable to the Mechanics Loan & Trust Company and by it endorsed *without recourse* to the Exchange National Bank, together with notes aggregating $10,000.00, executed by the Stack-Gibbs Company, *in which the Exchange National Bank appeared as payee.* It will also be borne in mind that no money or other thing of value was at any time ever paid on account of these notes by or to the Mechanics Loan & Trust Company (263). Upon the delivery of the notes by the officers of the Stack-Gibbs Company to the Mechanics Loan & Trust Company the notes were delivered immediately to the Exchange National Bank, which concern thereupon credited the account of the Stack-Gibbs Company with the proceeds of the notes,

after allowing discount charges. The Exchange National Bank kept no account with the Mechanics Loan & Trust Company with reference to these transactions, and for all intents and purposes the only parties concerned in the transaction there developed were the Stack-Gibbs Company and the Exchange National Bank. Having endorsed the notes without recourse, the Mechanics Loan & Trust Company has no further interest in the transaction, it being charged with no liability, having been released therefrom by reason of its endorsement, and having no obligation to perform, it having advanced no money. The notes in evidence, and all of them, were at the time they were discounted, ever since have been, and still are, the property of the Exchange National Bank. In addition to what we have stated, there was offered and received in evidence a receipt given by the law firm of Post, Russell, Carey and Higgins, who appeared as counsel for appellees, to the Exchange National Bank for the notes in question, dated in December, 1916, six months after the bankruptcy. Under these circumstances what is the position of the Exchange National Bank relative to its claiming any benefit or advantage under the Minneapolis contract, which has been otherwise referred to as the so-called trust agreement? It is our contention that the Exchange National Bank was

neither more nor less than a volunteer, loaning its money to the Stack-Gibbs Company and taking the notes of the Stack-Gibbs Company therefor, and under the authorities it cannot invoke the principle of exoneration through subrogation to the rights and securities which the Mechanics Loan & Trust Company might have had it, rather than the Exchange National Bank, had advanced the money. We wish to call the attention of the Court to some of the cases upon this subject.

In the case of Aetna Life Insurance Company vs. Middleport, 124 U. S. 534; 31st Lawyers' Edition, 537, it appeared that the plaintiff was the owner of fifteen bonds issued by the town of Middleport and delivered to the Chicago, Danville & Vincennes Railroad Company. The bonds were payable to bearer and were bought of the railroad company by the complainant, who paid value for them. Liability for payment was denied upon the ground that the proceedings which authorized the issuance and delivery of the bonds were void, perceiving which the life insurance company proceeded upon the theory of subrogation to the rights of the railroad company, which independent of the bonds, had at the time of the receipt of the bonds, a claim against the City of Middleport for the indebtedness which the bonds represented. The Supreme Court passing upon the subject in which

is probably the leading case in this country, used the following language (italics by counsel):

> "But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation.
>
> "The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity

subrogated to said rights, and entitled to enforce the same against the town of Middleport.

"The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says:

" 'The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests.'

"He founds his argument entirely upon the proposition, that when the complainant purchased these bonds he thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town.

"The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another,

and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

"The language of this court in Otis *et al.* v. Cullum, Receiver, 92 U. S. 447, is very apt, and expresses precisely what was done in this case. In that case Otis & Company were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money

paid to it for the bonds. After referring to the decision of Lamber v. Heath, 15 Meeson & Welsby, 486, this court said:

" 'Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. *If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.'* (P. 449.)

"Nor can this case be sustained upon the

principle laid down in this court in Louisiana v. Wood, 102 U. S. 294. That was a case in which the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for the purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex aequo et bono* to pay it back. The court said:

" 'The only contract actually entered into is the law implies from what was done, to-wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied.'

"In the present case there was no borrowing of money. There was nothing which pretended to take that form. *No money of the*

complainant ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road.

"The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds.

"Litchfield v. Ballou, 114 U. S. 190, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of waterworks. In that case, as in Louisiana v. Wood, the bonds were so far in excess of the authority

of the town to create a debt that they were held by this court to be void in the case of Buchanan v. Litchfield, 102 U. S. 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted in that case to establish the proposition, that, the money of the plaintiffs having been used in the construction of the waterworks, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original

creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. *It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.*

"But even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid

this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company.

"These propositions are very clearly stated in a useful monogram on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement,

takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.' Sheldon on Subrogation, Secs. 2, 3.

"In Sec. 240 it is said: *'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so, for the preservation of any rights or property of his own.'*

"This is sustained by a reference to the cases of Shinn v. Budd, 14 N. J. Eq. (1 McCarter) 234; Sanford v. McLean, 3 Paige, 117; Hoover v. Epler, 52 Penn. St. 522.

"In Gadsden v. Brown, Speer's Eq. (So. Car.) 37, 41, Chancellor Johnson says: 'The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature

never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.'

"This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

"Chancellor Walworth, in the case of Sanford v. McLean, 3 Paige, 122, said: 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the

money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.'

"In Memphis & Little Rock Railroad v. Dow, 120 U. S. 287, this court said: 'The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties.'

"In the case of Shinn v. Budd, 14 N. J. Eq. (1 McCarter) 234, the New Jersey Chancellor said (pp. 236-237):

" 'Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitutes into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, book 3, tit.

3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig., part 3, c. 1, art. 6, Sec. 2. 'We are ignorant,' says the Supreme Court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but to him who, being bound for it, discharges it.' Nolte & Co. v. Their Creditors, 9 Martin, 602; Curtis v. Kitchen, 8 Martin, 706; Cox v. Baldwin, 1 Miller's Louis R. 147. The principle of legal substitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits.'

"The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the code of that State is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the State of Illinois—Suppiger v. Garrels, 20 Bradwell App. Ill. 625, the substance of which is thus stated in the syllabus:

"'Subrogation in equity is confined to the

relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer.'

"No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's endorsement, and as a matter of business. The complainant company has, therefore, no right to the subrogation which it sets up in the present action.

"Without considering the other questions, which is unnecessary, the decree of the Circuit Court is affirmed."

We wish also to refer the Court to the case of M'Kinnon v. New York Assets Realization Company, 217 Fed. 339, decided by the Circuit Court of Appeals for the Second Circuit, which arose over a situation created by the wrongful pledge of

corporate stock owned by a bank, along with stock of another owner as collateral security for the pledgor's individual note, on maturity of which the pledgor tendered payment of the note, which was refused. Subsequently the bank paid the note and received all of the collateral, and thereafter sought the right to exoneration or contribution from the stock of the other owner; the Court holding that the tender by the pledgor, while it did not discharge the debt, extinguished the lien of the pledgee, therefore enabling the bank to recover its own stock without payment of the note, created of the payment by the bank, purely a voluntary tender, held:

> "The complainant also bases his appeal to the aid of a court of equity upon the theory that he is entitled to be exonerated from the payment of the Morse note and to be reimbursed for his payment of the note in accordance with the terms of the judgment against the Metropolitan Trust Company by the proceeds from the sale of the Heinze stock, and that this right of exoneration is recognized solely in equity. The answer to this is that the principle of exoneration is not applicable to the facts of this case. It is true that the 500 shares which belonged to the bank were

taken without consideration to it and used to secure for Heinze the money wherewith to pay for the balance of the purchase price of the shares belonging to Heinze, and that the bank at one time may have been in a position where it would have been entitled to have had the shares of Heinze's stock belonging to it exonerated from the payment of the Morse note. But, whatever its right to do this may have been, it ceased to possess any such right when it voluntarily paid the Morse note. It paid that note as a volunteer, being at the time the payment was made under no compulsion to make it. While the trust company's lien on the stock continued it could not have recovered its own stock without paying the note, but when the trust company lost its lien on the stock by the tender the bank could at once have recovered the stock without paying the Morse note. *One who is under no legal obligation or liability to pay a debt is, if he pays it, a mere volunteer.* In paying the note as a volunteer the complainant lost his right to invoke the principle of exoneration." (The italics are by counsel.)

The very recent case of Citizens' Trust Co. v. Mullinix, 235 Fed. 875, decided by the Circuit Court of Appeals for the Eighth Circuit, recognizes

the very principle contended for. There two notes had been given to respective individuals secured by liens upon the property of a bankrupt lumber company. When the notes matured they were attached to drafts drawn by the lumber company and forwarded to the claimant bank of which the President of the lumber company was the cashier. When these drafts were received by the bank, they were paid and the drafts and notes accompanying the same marked "Paid." As is stated in the decision, for some reason which does not appear, the bank never charged the amount of these drafts to the lumber company on the bank's books. It is said by the Court:

> "The claimant insists that, because the amount of the drafts were not charged to the account of the lumber company upon the books of the bank, the latter is entitled to be subrogated to the lien of the drawers of the draft, as the transaction simply amounted to a purchase of the notes by the bank. This contention cannot prevail. Whether the proper entries were made on the books of the bank or not, the fact still remains undisputed that the drafts and notes were paid when they were presented to the Pemiscot County Bank, and that ended the matter; they now stand as general claims against the bankrupt, but without

> preference. The bank, when it paid the drafts and the notes, had no interest of its own to protect, the payments were purely voluntary, and no fact is shown which would entitle the bank to the right of subrogation."

An examination of the digests discloses that in addition to the Federal Courts *every state in the Union* has adopted the rule contended for as is laid down in the cases hereinbefore quoted from. To cite further authority would simply prolong what must of necessity be a somewhat lengthy brief; suffice it to say, that the law is such that the Exchange National Bank cannot under the authority of the decisions of our Courts be subrogated to any rights of the Mechanics Loan & Trust Company, whatever they may be.

IV.

The Trustee acted in bad faith.

It is not our purpose to deny or avoid the rule of law which rewards a trustee who, in the discharge of his duties as such acts in good faith and with care, diligence and dispatch. That rule is too well known to warrant discussion. On the other hand, equally well known and recognized is the rule which deprives that trustee of the right not only to compensation but to reimbursement and allowance of his expenses and liabilities.

In what we have just said, it is not our intention to recognize what we have hitherto denied, namely, the right of the Exchange National Bank to relief, but without waiving our insistence thereto, we wish to be understood as contending that wholly independent of what has been hereinbefore stated, it is our contention that the relations between the Mechanics Loan & Trust Company and the Exchange National Bank on one hand, and the creditors of the Stack-Gibbs Company on the other hand disclose fraud, deceit and bad faith on the part of the two banks.

Beginning with the trip of E. T. Coman, the President of the Exchange National Bank, to Minneapolis in company with C. D. Gibbs and ending with the filing of the so-called "Trust Agreement," within the hour of the filing of a petition in bankruptcy against the Stack-Gibbs Company, the record discloses an endless procession of acts and omissions on the part of the Exchange National Bank and the Mechanics Loan & Trust Company, committed and omitted with such abandon as to be utterly inconsistent with honorable business dealings.

1. Prior to January 1st, 1916, the Exchange Bank had made some relatively small loans to the Stack-Gibbs Company, the state of such loans

having been as follows: In December, 1915, a four thousand dollar loan with a balance note of ten thousand dollars (246); in January, 1916, it was an eight thousand dollar loan with a balance note of fifteen thousand dollars (247); on January 1st, 1916, six thousand dollars with a balance note of fifteen thousand dollars (247). For many months it had been the custom of the Exchange Bank and the Stack-Gibbs Company for the Exchange Bank to take what was, as hereinbefore mentioned, "Balance Notes," being interest bearing notes signed either by the Stack-Gibbs Company or some of its officers, and thereby creating a purported credit with the Exchange Bank, however, upon the agreement that no checks were to be drawn against said account (237). Sometimes these notes were signed by Gibbs (239); sometimes by Tolerton (239); sometimes by Cleland (239), all officers of the Stack-Gibbs Company. The Stack-Gibbs Company invariably paid the interest on these notes (253), but none of these amounts were available to the Stack-Gibbs Company for checking purposes. On December 30th, 1915, two notes were issued, one (Respondent's Exhibit 7) for ten thousand dollars, signed by C. D. Gibbs, and Stack-Gibbs Lumber Company, and one (Respondent's Exhibit 6) for five thousand dollars, signed C. D. Gibbs. Both these notes were entered on the bills receivable reg-

ister of the Exchange Bank (251), and a certificate of deposit was pinned to the five thousand dollar item, and thereafter that five thousand dollars was not entered upon the depositor's ledger of the Exchange Bank. The ten thousand dollar note was entered upon the depositor's ledger of the Exchange Bank as a credit to the Stack-Gibbs Company, "Account number 2," with a notation that no checks were to be honored against that account unless the same were countersigned by E. T. Coman (251-252). At this time the Exchange Bank had extended actual credit to the Stack-Gibbs Company of three thousand dollars represented by an unsecured promissory note and three thousand dollars represented by an escrow deposit for three thousand dollars in cash, payable to the Stack-Gibbs Lumber Company upon the completion of the real estate title as claimed by the Exchange Bank to have been held as collateral security (12).

The books of the Stack-Gibbs Company show what was happening according to the fact, as we contend, that the Stack-Gibbs Company was at that time indebted to the Exchange Bank in the sum of twenty-one thousand dollars, being the aggregate of all of these notes (195-197). On February 14th, 1916, Mr. Coman, acting for the Exchange Bank, collected interest upon the two notes for five thousand dollars and ten thousand

dollars, respectively, until February 14th, 1916, and the Stack-Gibbs Company paid the interest upon these two notes from December 30th, 1915, until February 14th, 1916, aggregating $153.33 (Respondent's Exhibit 1), at which time the notes were canceled and sent by Mr. Coman to the Stack-Gibbs Company (Respondent's Exhibits 1, 6 and 7, page 247). This conduct upon the part of the Stack-Gibbs Company and the Exchange Bank was unlawful, and under Mr. Coman's testimony the contract was usurious, and when analyzed shows that at the time of the making of the Minneapolis contract the Stack-Gibbs Company was paying to the Exchange Bank through dealings had with Mr. Coman personally, usurious interest and the making of these contracts charged Mr. Coman, the Exchange Bank and the Mechanics Loan & Trust Company with knowledge of the fact, wholly independent of the further fact that not only was Mr. Coman within an hour's run of the plant of the Stack-Gibbs Company, but had actually had the books of the Stack-Gibbs Company checked; that the Stack-Gibbs Company was in such financial condition that it was willing to pay eight per cent interest upon the aggregate of twenty-one thousand dollars in order to secure the use of six thousand dollars, three thousand dollars of which was secured by a cash deposit. No debtor which

was in such financial straits that it would make the contracts which Mr. Coman testifies were made between the Stack-Gibbs Company and the Exchange Bank could be in such condition of solvency as would entitle it to continue in business, especially in view of the fact that that condition of affairs has continued for years and was not due to any sudden stress.

At the meeting in Minneapolis, Mr. Coman knowing these facts failed to disclose them to the creditors assembled. In other words, he concealed the facts because his position was such, being an officer and principal owner of the Mechanics Loan & Trust Company, who was to act as Trustee as he was, it was his duty to disclose them. When confronted with this situation, Mr. Coman first testified neither the five thousand dollars nor the ten thousand dollar notes were ever delivered or entered on the bank's record, but that they were simply inchoate transactions (229 and 230). When confronted with the entry on the bills receivable register of the Exchange Bank showing that these notes were entered by the bank as actual loans (234), he then, after consideration, explained the situation by saying that the five thousand dollar loan was always inchoate, the note was never delivered, but the ten thousand dollar note was a balance note (237). When confronted with the

fact that the interest had been paid upon both of these notes, he then testified that the notes had been taken and interest collected, but that the notes were canceled on January 25, 1916 (a date prior to the Minneapolis meeting) (239). When confronted with the fact that interest was paid to February 12th, and that the notes were canceled on the latter date, he was speechless, except to say that the Exchange was at that time securing whatever it could get of the Stack-Gibbs Company, and that he had not had anything personally to do with the transaction (255). Subsequent to the completion of Mr. Coman's testimony, the original notes were found and introduced in evidence, Respondent's Exhibits 6 and 7, which notes show that they were canceled on February 12th, 1916, and Respondent's Exhibit Number 1 being the letter, returning the notes to the Stack-Gibbs Company on February 12th, and signed by Mr. Coman personally.

Armed with this knowledge, Mr. Coman on or about February 1st, 1916, in company with Mr. Gibbs, journeyed to Minneapolis for the purpose of interviewing the large creditors of the Stack-Gibbs Company, and with them they took a deed of trust of all of the property of the Stack-Gibbs Company which had previously been prepared by Mr. Post, attorney for the Mechanics Loan & Trust

Company, and the Exchange Bank (216). Mr. Coman and Mr. Gibbs met with a large number of the creditors of the Stack-Gibbs Company at Minneapolis for several days, culminating in what we have referred to as the Minneapolis contract. Among those present at this meeting were the representatives of all the creditors who ultimately signed the trust agreement, excepting J. K. Stack, Genevieve S. Tolerton and Minnie A. Gibbs. At that meeting, with the consent and acquiescence of Mr. Coman, it was represented by Mr. Gibbs that the Stack-Gibbs Company was in splendid financial condition, that its assets largely exceeded its liabilities, that with leniency on the part of its larger creditors and a sufficient fund in cash to meet its pay-roll and take care of its smaller creditors who might become troublesome, it may be able to work out its indebtedness to all its creditors. And it was asserted to the creditors that fifty thousand dollars would be sufficient money to save the corporation and, at the suggestion of one of the creditors at this meeting, the possible sum which might be advanced if necessity required was by the terms of the contract increased to one hundred thousand dollars (278). We submit that when Mr. Coman went with Mr. Gibbs for the purpose of securing the assent of the creditors to the execution of the trust deed under which

his company was to act as trustee, that he was under the affirmative duty to disclose to those creditors all the facts within his knowledge relative to the financial condition of the Stack-Gibbs Company, and that his silence in the face of the palpable false representations of C. D. Gibbs as to the condition of the Stack-Gibbs Company amounted to fraud upon the balance of the creditors. The record shows, that at the time of this meeting the Stack-Gibbs Company was absolutely insolvent.

At this juncture we deem it advisable under this sub-heading to take the opportunity of answering a question asked by Judge Dietrich in his opinion, that being, namely:

> "So far as appears, the trustee and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6000.00 and was relatively unimportant. I am wholly at a loss to understand how the Trustee could have had any strong motive of self-interest such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement,

by which alone it could have protection, was in effect?"

We beg to point out to this Court the fact that in making this assertion and in asking this question Judge Dietrich was in error, for in addition to the $6,000.00 for which the Exchange National Bank signed the so-called trust agreement and which it is apparent the Exchange Bank by signing well hoped to have paid, *the Stack-Gibbs Company on February* 1, 1916, *had an overdraft at the Exchange National Bank of Spokane, of over* $9,000.00, which overdraft was paid contrary to the terms of the agreement by the first moneys received from the total deposit of $100,000.00.

As we have said, the books of the Exchange Bank and the Lumber Company did not agree, owing to the different manner in which, prior to February 1, 1916, the discounted notes were carried upon the books of the respective companies. For instance with respect to the two items aggregating $15,000.00—one for $10,000.00 and one for $5,000.00, the books of the Stack-Gibbs Lumber Company showed that upon the deposit of these two notes a balance stood in favor of the Stack-Gibbs Company at the Exchange Bank, while the books of the bank on the bills receivable ledger showed the transaction of the two notes aggregating $15,000.00

and the account of the Stack-Gibbs Company overdrawn, and in this particular instance to the extent of $9,000.00, as will appear by an examination of Petitioner's Exhibit No. 36½ introducing in evidence at page 209 of the Record. That this overdraft was met by the deposit of the moneys received under the trust agreement, we wish to quote from the testimony of Witness Katz under "Cross Examination" appearing on pages 209 and 210 of the Record:

> "MR. ADAMS: Will you tell the Court what was the balance in the Exchange National Bank to the Stack-Gibbs Lumber Company starting with the first day of January, 1916?
>
> A. The first of January the deposit to the Exchange Bank of Spokane was $28,195.77.
>
> Q. Will you tell us whether or not in making up that item of twenty-eight thousand and some odd dollars, was included in the $15,000.00?
>
> A. Yes, it was included in the $15,000.00.
>
> Q. Now, will you turn to the latter part of January, now at the end of January what was the bank balance in the Exchange National Bank of Spokane?
>
> A. $10,074.11 (175).

Q. Now, starting with the first of February of this same book—I do not mean starting—let us take it down here to February 14th—now on the 14th of February, 1916, what was the state of the account just before that item was charged ,what was the total withdrawals and the total deposits?

A. Total deposits, 078,496.04. The total withdrawals, $72,084.13.

Q. So you had a balance of approximately six thousand dollars in the bank?

A. Correct.

Q. When the $15,000.00 was taken out of your bank balance how much did you have left, or what was the condition of it?

A. It was overdrawn about $9,000.00.

Q. How was that overdraft finally made up, how did you pay the bank that overdraft?

A. Well, I guess any money that came in, money through notes and the money through deposits.

Q. Didn't you deposit and discount one of these five thousand dollar notes in this controversy here?

A. Yes.

Q. That went into that account to make up that balance?

A. Undoubtedly (178).

MR. POST: When was that deposited?

A. $10,000.00 on the 19th.

MR. ADAMS: On the 19th $10,000.00 was used, then what was the condition of this account with the Exchange when you used $10,000.00 of these notes?

A. Well, we still had $5,000.00 overdrawn.

Q. You were still $5,000.00 to the bad?

A. Yes—we kept drawing checks.

Q. Will you go to page 169 under the date of the 24th and see if you used another $5,000.00 note?"

Further as appears on pages 195 and 196 of the Record, in which it is said:

"Q. You find an item on the 15th of $15,000 credited to the Exchange National Bank; when was your attention first drawn to that item?

A. Practically this morning when I looked through the books; I saw at a glance when I talked to you on Saturday—

Q. Who do you refer to by you?

A. Mr. Post, and we talked about that something must be wrong and I looked over it and that item of $15,000.00; when I read those figures out of the books I wasn't asked about it and I didn't mention it.

Q. Was that a part of your first $40,000.00 paid out of those notes that we discounted?

A. It must have been.

Q. How was the balance of that overdraft made up of $6,000.00; wasn't there a $5,000.00 note discounted a few days afterward which helped make up this $6,000.00 overdraft, which helped to pay the Exchange Bank?

A. There was still an overdraft left.

Q. While that overdraft was left did you put in another $5,000.00 note?

A. Yes, in order to square that overdraft we put in another $5,000.00 note on February 24th.

Q. One of those same notes, this note of February 24th that was canceled and afterward renewed?

A. That is correct (148).

Q. Did you write the Fort Dearborn that

you had found $15,000.00 of notes of the Exchange Bank that you had paid?

A. I did not write it to anybody, I did not know it.

Q. There had been an entry made on the books showing all the money paid out for that purpose at that time?

MR. POST: What purpose?

MR. ADAMS: To pay the Exchange Bank out of this $40,000.00?

A. It shows here an entry in the check register.

Q. When was that put on there?

A. February 15th.

Q. Was it actually entered on February 15th?

A. Yes."

Such things as these cannot be considered to be mere oversight on the part of the individual who, for his own gain, not only failed to disclose them, but who takes advantage of the non-disclosure by reaping the reward of his silence.

2. Paragraph 1 of the so-called trust agreement, namely, the Minneapolis contract, provides "That the Trustee shall forthwith take possession of the trust estate as of an estate in fee simple."

The Mechanics Loan & Trust Company did not take possession of the assets of the Stack-Gibbs Lumber Company. Not only is this point an important factor in determining whether or not the Trustee acted in good faith, but it also becomes material in this inquiry as characterizing the conduct of the Exchange Bank in advancing the money which it loaned to the Stack-Gibbs Company as bearing on the question whether or not these advances were made under and in accordance with the terms of the contract in such manner that the advancements become a lien on the property of the Stack-Gibbs Company, or remained a mere unsecured obligation of that corporation. In other words, the question of whether or not the Mechanics' took possession is important as characterizing its subsequent conduct and that of the Exchange Bank as to whether or not the same fell within the contract and the claim became secured, or did not fall within the contract and remained a mere loan of money. The contract itself specified that Katz should be made and remain the agent of the Lumber Company and the Mill Company. Katz' possession of the property if he was in possession, was the possession of the Stack-Gibbs Company *to the exclusion of all others.* The Mechanics' was in contractual relation with the Mill Company and therefore without the disclosure

of each and every of the creditors and their consent thereto. It was not competent for the Mechanics' to make Katz its agent, or to make possession by the corporation its possession. The pretense of possession by the Mechanics Loan & Trust Company was a mere sham. The only testimony in that regard consisted of a letter from the Mechanics Loan & Trust Company to Katz, uncommunicated to any other person, in which the Mechanics Loan & Trust Company said to Katz, "You are now in possession as the agent of the Mechanics Loan & Trust Company." This was palpably false and fraudulent because the contract under which the Mechanics Loan & Trust Company now claims, specifies that Katz's function should be that of active manager of the company, and not that specified in the secret correspondence between Katz and the Mechanics Loan & Trust Company. Outside of the reply by the corporation, signed by Katz, not an act was done by the Mechanics Loan & Trust Company, or any one in its behalf looking towards the management of the business. *Before Katz had arrived in Spokane forty thousand dollars of the money of the Exchange National Bank had been loaned to the Stack-Gibbs Company,* and on the day of his arrival, February 16th, 1916, twenty thousand dollars additional moneys were so loaned to the Stack-Gibbs Company (Petitioner's

Exhibit No. 31). It thus appears that not only had a total of sixty thousand dollars of the one hundred thousand dollars sought to be recovered was advanced before any pretense of possession was taken by the Mechanics Loan & Trust Company, but before Katz had taken charge of his duties in any capacity. *Not only is this true, but it also appears that the very contract and agreement under which the Exchange Bank seeks to recover was not executed by the Stack-Gibbs Company until twelve days thereafter, to-wit, February 28th, 1916 (Petitioner's Exhibit 14), and was not executed by the Mechanics Loan & Trust Company until the 29th day of February, 1916.* The italicized portion of what has been last been said might well be made the topic of a separate heading in this brief, as it, in our judgment, utterly precludes the Exchange Bank from maintaining its position upon any theory as to that sixty thousand dollars, but as we have said, this brief must of necessity be drawn to too great length.

3. Paragraph 2 of the so-called trust agreement provides, "The Trustee may in its discretion, but shall not be required to, carry on the whole or any part of the business heretofore conducted by the Lumber Company and the Mill Company"; under this provision it was optional with the Mechanics Loan & Trust Company to do one

of two things, either to close the business, realize upon the assets and distribute the same, or to do the very thing which the creditors had empowered it to do, namely, to operate the business. The record discloses that it did neither. It simply drifted, the business continued exactly as it had before the so-called trust agreement was executed, not a thing was done by the Mechanics Loan & Trust Company with respect to the operation of the business or the marshalling of the corporate assets. Except for the interjection of Katz as an officer of the company the Stack-Gibbs Lumber Company pursued the even tenor of its way, and always with the idle acquiescence of the Mechanics Loan & Trust Company, in a downward direction. This great trust imposed upon the Mechanics Loan & Trust Company by creditors whose claims aggregated in excess of half a million dollars, was absolutely abandoned to the mismanagement of those who had previously shown themselves utterly disqualified to handle the affairs of the corporation. How can the position of the Mechanics Loan & Trust Company and the Exchange Bank, which seeks to be its privy, be considered as consistent with good morals, good business and the fiduciary relationship of a trust company? We hazard the suggestion that this question will go unanswered.

4. Paragraph 4 of the so-called trust agreement

is as follows: "The Trustee shall collect such debts owing to the Lumber Company and the Mill Company as are collectible in the exercise of ordinary diligence." *The Trustee collected not a single dollar.*

5. Paragraph 5 of the so-called trust agreement reads as follows: "The Trustee shall realize upon the trust estate as rapidly as in its judgment it is possible to do so without unreasonable sacrifice thereof." The Trustee realized nothing except increased obligations of the company, as Respondent's Exhibit 4 (pages 301, 302, 303, 304, 305, 306), disclose that between February 1st, 1916, and July 29, 1916, the business was operated at a loss and heavy obligations incurred.

6. Paragraph 10 of the so-called trust agreement reads as follows: "The Trustee shall advance such sum of money as it deems necessary to meet the payroll of the Lumber Company and the Mill Company and to discharge the claim of the creditors who do not execute this agreement, as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of One Hundred Thousand Dollars."

While it cannot be said that the Trustee advanced the sum of One Hundred Thousand Dollars, it can be said that such moneys as were advanced

by the Exchange National Bank, which, if it receive the benefit of the so-called trust agreement, must accept with it the liabilities thereof, were placed without restriction to the credit of the Stack-Gibbs Lumber Company, not under the supervision of the Mechanics Loan & Trust Company that the payroll might be met and the disturbing creditors paid; but to the unrestrained pen of that officer of the Stack-Gibbs Company, whose privilege it was to draw upon those funds for such purpose as he saw fit, and limited only by his own whim and caprice.

We charge, and without fear of denial, that this breach of trust on the part of the Mechanics Loan & Trust Company, as much as any other single thing, has led to the great catastrophe now on parade before this Court. This, as much as any other item of neglect on the part of the Trustee led to the failure of the very object and purpose for which the agreement was executed, namely, the consolidation of the large creditors and the payment of those small creditors who would not be bound by and some who could not be asked to execute the agreement.

A more wanton display of neglect and malfeasance it has never been our duty to observe. It is simply astounding that such action could

happen and upon any theory receive the sanction of a court of justice.

But assuming, difficult though that may be, that all the parties were acting in good faith, the Exchange National Bank in demanding the return of the sum of One Hundred Thousand Dollars must be held to that great principle of equity which recognizes that as between two innocent persons, the loss must fall upon him whose act or neglect has caused the injury.

V.

The so-called trust agreement never became operative due to the fact that ninety per cent of the creditors never executed the same.

Paragraph 20 of the instrument provides as follows:

> "This instrument shall not take effect until creditors representing ninety per cent in the amount of the indebtedness of the Lumber Company have attached their signatures hereto."

That this is a condition precedent there can be no doubt. As far back as 1843, the Honorable John McLean, Circuit Justice, in the case of Lawrence vs. Davis, Federal Cases, No. 8137, in construing a similar provision contained in an assignment for

the benefit of creditors providing that the assignee shall render an account to a major part of the creditors, "And that they shall sanction the assignment before it can take effect," it was said:

> "It is earnestly averred that the acquiescence of a majority has not been shown. 2 Story, Contract, 302, 303; Gerard vs. Lord Lauderdale, 11 Eng. Ch. 451, 3 Sim. 1. This last objection has not been answered and it seems fatal to the assignment. A majority of the creditors have not assented to it, and without this by the terms of the assignment, it cannot take effect."

Let's turn to the facts. The undisputed evidence (Respondent's Exhibit 3) concerning the indebtedness of the corporation, is as follows:

On February 1st the Stack-Gibbs Company was actually indebted in the sum of $861,853.27. Of this sum there was on the corporate books		$636,519.35
90% of which aggregates	$572,867.41	
There was not on the books		40,333.92
90% of which is	36,300.52	
And there were not on the books the claims of Hess, Searle and Stack, amounting to		195,000.00
90% of which is	175,500.00	

Of the creditors making up the $636,519.35 on the books of the corporation, the aggregate of $444,940.00 signed the trust deed. None of the creditors making up the $40,333.92 not on the books of the corporation signed the trust deed. Searle, Stack and Hess, aggregating $195,000.00, signed the trust deed. The claims of Searle, Stack and Hess amounting to $195,000.00, were indebtedness due those individuals from the Dryad Lumber Company, and the Stack-Gibbs Lumber Company had executed contracts whereby it guaranteed the payment of this indebtedness, and such guarantee did not appear on the books of the corporation. The item of $40,333.92 not appearing on the books of the corporation, consisted of taxes, freight charges, loan made upon the insurance policy of the life of C. D. Gibbs, account for railway materials furnished and certain logging contracts, as will particularly appear by reference to Respondent's Exhibit No. 3. The term of the contract under discussion is plain and specific and it is immaterial whether the Court construes the expression 90% of the amount of the indebtedness of the Lumber Company to refer to the indebtedness shown by the books of the corporation, or construes such expression to refer to the entire indebtedness. If it refers only to the indebtedness shown by the books of the corporation,

then, as we have seen, the aggregate of such indebtedness is $636,519.35, 90% of which is $572,867.41, and it does not include the indebtedness of Searle, Stack and Hess, aggregating $195,000.00. The total amount of indebtedness due creditors signing the trust agreement aggregates $636,519.35 (Petitioner's Ex. No. 14). If we deduct the signatures of Searle, Stack and Hess, then the total amount of creditors shown on the books of the corporation who signed the trust agreement aggregates $444,940.00, or less than 90% of the creditors of the Stack-Gibbs Company. If the Court construes the contract to include all the creditors of the Stack-Gibbs Company, whether on the books of that corporation or not, then the total indebtedness of the corporation aggregates $871,853.27 and the number of creditors who signed, aggregating $639,940.56, is less than 74% of the creditors, so that by either alternative the number of creditors of the Stack-Gibbs Company who attached their signatures to the trust agreement was less than 90%, and by the above quoted contract, the instrument did not take effect. This condition on the execution of the contract is put in as an express provision. It was vital to the signing creditors for the reason that that paragraph of the contract which authorizes the advancement of the $100,000.00 now claimed to be a lien as against

these signing creditors, authorizes such money to be paid out by the Trustee for but two purposes, one to meet the current payroll of the Stack-Gibbs Company and the other to pay off such portion of the 10% of the creditors who did not sign the agreement who should become troublesome and as the Trustee should determine to pay. If the number of such non-signing creditors who were not bound to have barred the collection of their claims was 10% or less, then the $100,000.00 authorized to be advanced would be sufficient for the purpose, but if such creditors reached 30%, the probability of the success of the scheme agreed to by the creditors would be very much decreased. The creditors signing the agreement thereby extended their indebtedness and deprived themselves of all process for the collection of such indebtedness, and created a possible claim prior to their own only in the event that a sufficient number of creditors should sign so that the aggregate thereof should be at least 90% of all the creditors of the company.

The fact that less than 90% of the creditors of the company did not sign is admitted by the petitioners, but the petitioners seek to avoid the plain terms of the contract by two methods. They first say it was understood at Minneapolis that when the signatures of J. K. Stack and Mrs. Tolerton

(neither of whom was present) had been added to the agreement that that would constitute 90%, and they say, second, that the provision that 90% of the creditors must sign did not refer to certain of the creditors to whom the Stack-Gibbs Company had become indebted, for the reason (a), some of those debts were to be discharged in lumber; (b), some were secured; and (c), the existence of others is disputed.

As to the first of these positions, to-wit, that it was understood and agreed at Minneapolis that paragraph 20 of the trust agreement (Ex. No. 14), would have been complied with upon the contract being signed by J. K. Stack and Mrs. Tolerton, this position is predicated upon the testimony of Mr. Coman and from certain letters and telegrams subsequently sent by Mr. Aaron. The Coman testimony must be disregarded for the reason that it is parol evidence offered for the purpose of varying the terms of a written contract and went in over respondents' objections. Mr. Coman's testimony was as follows:

> "Mr. Gibbs submitted a statement of his assets and liabilities at Minneapolis and a copy of that statement was furnished not only to us but to all the other creditors there, and the way we figured it out was when we sub-

> mitted it to Mrs. Tolerton that completed the necessary signatures by them, or the 90%." (220.)

This was plainly a negotiation leading up to the execution of a written instrument which is plain and unambiguous, and such testimony is excluded by every court under the fundamental principles of the law of evidence. But furthermore, the testimony does not establish what is claimed for it. The testimony falls short of any statement that it was agreed by any of the creditors that the signatures of Mrs. Tolerton and J. K. Stack should be accepted as a compliance with that term of the contract, and only shows that tentatively this was the assumption of all the parties at Minneapolis, but the contract further provides (paragraph 21), that the contract should not take effect until a stockholders' meeting had been held, Katz had been elected Trustee, etc., plainly showing that it was not intended by the makers of the contract that the contract should go into effect upon the signature of Mrs. Tolerton and J. K. Stack, but the contract could not take effect until opportunity for further investigation by the Mechanics and all parties interested. As a matter of fact, an inspection of the co[illegible] will show that it was not executed by the Mechanics until very late in the month of February, and its execution was not

authorized by the Stack-Gibbs Company until February 18th at least, although the petitioners contend that they were acting under this non-executed contract as early as February 9th.

The letters and telegrams of Mr. Aaron and Mr. Coman (Petitioner's Ex. Nos. 34, 42, 43, 44, 46 and 47), bind no persons at th eoutside except the Exchange, Fort Dearborn National Bank and Merrill, Cox & Company, only three of these numerous signers, whereas there is no pretense that either J. K. Stack, Minnie A. Gibbs or Genevieve S. Tolerton had any knowledge whatsoever of such understanding. Those letters and telegrams are inadmissible for the purpose for which they were introduced, and an inspection of them will show that they do not contain a single element of any waiver of this term of the contract.

The Stack-Gibbs Company knew who its creditors were. The Mechanics and Exchange had the means of knowledge and were charged with the duty of ascertaining who such creditors were. Mr. Coman, the agent of the Mechanics and the Exchange, was in Minneapolis actively assisting the Stack-Gibbs Company in bringing about the execution of this contract, and was possessed of the opportunity of easily and definitely ascertaining whether this term of the contract had been com-

plied with. At Spokane he was within an hour's run of absolute and definite information. It will be noted in this connection that Mr. Coman did not disclose to the creditors at the Minneapolis meeting that the Stack-Gibbs Company was willing to borrow and had been borrowing from $4,000 to $8,000 and had been paying interest on $14,-000 to $21,000 in consideration of the making of such loan, or in other words, had been paying to the Exchange from 30% to 40% per annum interest on bank borrowings from his bank, and he did not disclose to the creditors that the Exchange was at that time collecting interest from the Stack-Gibbs Company on $21,000 for an actual loan of $6,000, which was interest at the rate of 35% per annum, and one-half of this loan was secured, but concealed the circumstances from the other creditors and traveled fifteen hundred miles to induce the creditors of the Stack-Gibbs Company to enter into this agreement, and under the circumstances shown, the corporations of which he was the head should not be permitted to escape the responsibility to the other signers of determining the facts so easily within their ascertainment. Mr. Aaron's belief that the signature of Mrs. Tolerton would constitute the necessary 90% of the creditors was based upon the representations made at the Minneapolis meeting by Mr. Gibbs at least in the pres-

ence of Mr. Coman. If he had any information on this subject it was communicated to him by Mr. Gibbs or Mr. Coman. The signing creditors were widely scattered. As we have seen, at least three of them were not at the Minneapolis meeting and were not affcted by any arrangement or understanding thereat of which they could have had no knowledge. We submit that it is a fact that 90% of the creditors did not sign the agreement, and by the terms of the contract the signature of 90% was a condition precedent to the fulfillment of the contract, and whoever claims under the contract must show that such condition was complied with in fact, and that the Mechanics, if it was deceived, had no right to rely upon the deception with the means of accurate information at hand, and if deceived at all was not deceived by any creditor who signed this contract.

We will next consider the assertion that certain of the indebtedness of the Stack-Gibbs Company should be excluded from the computation.

1st. Indebtedness amounting to $40,333.92 not on the books shown on page 3 of Respondents' Exhibit No. 3. As to this item, the Mechanics, the Exchange and the non-signing creditors were equally ignorant, but there is no reason why the responsibility for that ignorance should fall on

the signing creditors. The contract provides that it should not take effect until 90% shall have signed, and the sound rule of construction is that whoever claims to act under the contract must ascertain that the conditions precedent to the validity of the contract have been complied with. As to the petitioners' contention that unless the responsibility for knowledge of the number and amount of the Stack-Gibbs Company's indebtedness is placed upon the respondents, the contract will operate as a snare is best answered by the proposition that it was incumbent upon any one acting under this contract to ascertain the facts at his period, and that where all the parties were equally ignorant, the loss arising from such ignorance must fall upon him who acted without adequate information.

2nd. Petitioners insist that the indebtedness of the Exchange in computing the 90%, should be counted at $6,000 instead of $21,000. We have already seen that by the view most favorable to the petitioner, the facts were that the Exchange then had the interest bearing obligations of the Stack-Gibbs Company, aggregating $21,000, which it was carrying upon its books and representing to the bank examiner and to the public as valid interest bearing obligations of the bank, and upon which it collected interest, and which it subsequently canceled upon the payment of all interest

accrued on February 12th, and by cancelling the certificate of deposit representing the $5,000 and charging off the balance theretofore carried on its books as a deposit under Account No. 2. The bank's own books on February 1st showed that the Stack-Gibbs Company was indebted to the Exchange in the sum of $21,000 and that it had assets in the hands of the Exchange aggregating $15,000. The Stack-Gibbs Company's books showed the same state of facts (195, 196, 197). The contract was unlawful and usurious. We submit that no court should treat with any respect whatever the contention that the $15,000 represented by the two notes (Respondents' Ex. Nos. 6 and 7) was not indebtedness of the Stack-Gibbs Company to the Exchange.

It is next urged that the overdraft of $15,431.09 at the Exchange National Bank of Coeur d'Alene City should be included in computing the 90% of the creditors of the Stack-Gibbs Company. The situation there shown was simply this: The books of the Coeur d'Alene Bank showed no overdraft on February 1st. The books of the Stack-Gibbs Company showed an overdraft as stated. The books of both institutions are correct. It arose in this way: In conducting its business the Stack-Gibbs Company issued checks in the course of business. When the checks were issued they were credited

to the bank on the books of the company. Several days would intervene before the checks could be presented for payment. By the time checks were presented deposits would have been made to take care of the checks, and other checks were then outstanding, but the checks were issued in payment of indebtedness of the Stack-Gibbs Company. When the checks were issued, the theretofore existing indebtedness of the Stack-Gibbs Company was entered as paid, therefore the argument of the petitioners that this $15,431.09 should be excluded from the amount of the debts of the Stack-Gibbs Company falls to the ground for the reason that if it be conceded that the overdraft did not exist to the Coeur d'Alene Bank, then the claims of the creditors to whom those $15,431.09 checks had been issued, had not been paid and the indebtedness existed as an indebtedness of the corporation to those creditors, and it is therefore plain that this indebtedness of $15,431.09 did exist either in the form of overdrafts at the Coeur d'Alene Bank, as was shown by the books of the Stack-Gibbs Company or it existed in the form of indebtedness of the creditors to whom the checks were given, and therefore the item was and must be included as indebtedness of the Stack-Gibbs Company to some one. If it was indebtedness to anyone, it goes to make up the total with other claims, 90% of which

must be signed for. It is further contended that the claim of the Central Warehouse & Lumber Company and other claims amounting to $32,948.40 should be excluded from the computation of this 90% for the reason that the same was to be payable in lumber. A portion of the indebtedness sought to be excluded by the petitioners was upon contracts for the sale of lumber. The argument of the petitioners is based upon a technical definition of the word "indebtedness." It is true that the word "indebtedness" as used, for example, in the garnishment statute has been given a narrow definition, but this definition is entirely too narrow as applied to the contract in suit. The obligation of the creditors who were to be paid in merchandise can only be measured by the courts in money. No contracts by the Stack-Gibbs Company for the delivery or payment in lumber could ever be enforced specifically. Indeed, the contracts in every instance called for the payment of money and not merchandise. The lumber agreed to be delivered was an asset of the corporation to be used for the payment of its debts. The reason for the insertion of the 90% clause in the contract, as we have said, was to secure a sufficient number of signers so that the $100,000 which the contract authorized the Trustee to advance would be sufficient to meet the payroll and pay the re-

maining creditors who might become troublesome. The creditor whose account was payable in lumber was just as much a creditor and could become more troublesome than the creditor whose account was payable in cash. The collection of such a claim by taking lumber directly depleted the assets of the Stack-Gibbs Company, and would effectually paralyze that company and such creditors were doubly likely to be troublesome because they had claims against both cash and property. We can see no reason based on the language of the contract, the purpose to be effected or the reason and spirit thereof, which would authorize the excluding of those creditors from the 90%.

As to the Youman claim for $19,500, excluded by the petitioners from the computation of the 90%, that was an indebtedness upon promissory notes calling for the payment of money upon which the creditor claimed he had security by way of a pledge of a part of the assets of the corporation. That claim, therefore, was not only indebtedness in its strictest sense, but it was indebtedness of the highest type according to Mr. Youman's contention, to-wit, indebtedness upon which specific assets of the corporation could be taken from the corporation upon a foreclosure. Certainly no argument can be made that the Youman claim should be excluded from the computation. The argument

that Mr. Youman and other creditors should be counted as having signed the contract, while ingenious, can best be answered by an inspection of the document. They did not sign; their names are not there.

Unless the bank can successfully contend that each and every of these items are to be excluded from the computation, then the contract falls by its own terms and the contract never took effect and cannot bind the parties to the agreement, and no party can base any right thereon. The argument made by petitioners that because Mr. Aaron believed and relied upon the representations made by Mr. Gibbs and Mr. Coman at Minneapolis as to the amount of the creditors of the Stack-Gibbs Company, therefore the Mechanics can rely upon the fact that Mr. Aaron relied upon the truth of those representations, and therefore, although Mr. Aaron never represented any creditors except the Fort Dearborn National Bank and possibly Merrill, Cox & Company, yet nevertheless the Shoshone Lumber Company and the Idaho Timber Company, S. H. Hess and Genevieve Tolerton of Minneapolis, Minnie A. Gibbs of Spokane, J. K. Stack of Escanaba, Michigan, and I. F. Searle and First National Bank of Lincoln, Nebraska, the creditors whom Mr. Aaron never represented, are estopped from availing themselves of a plain

provision of the contract inserted for their protection and are deemed to have waived this term of the contract, is so lacking in every element of soundness as to be refuted by its mere statement. This should end the consideration of this case.

However, there is just one authority we wish to cite upon this subject which affects the contended error in the record, which permitted the testimony of Coman to explain what had been intended and understood by the term "ninety per cent." That is reported in the case of Bell vs. Mendenhall, 78 Minn. 57; 80 N. W. Rep. 843. An assignment for the benefit of creditors was made under a contract providing for the payment by one of the parties to the assignment of "all of the outstanding indebtedness" of the other parties, two in number, "not to exceed in the aggregate the sum of $130,000." It was sought in the trial court to introduce evidence tending to show that certain indebtedness was not included under the agreement, with respect to which the Court said:

> "The trial court excluded and rejected certain written and oral testimony which was offered by the trust company for the avowed purpose of explaining the intent of the parties to the trust contract when using the words 'outstanding indebtedness' therein, and to show that the claims herein involved were not among

those which, up to the limit of $130,000, the trustee had agreed to pay, and that just what debts were within the contract, and to be provided for by it, were well known and agreed upon by the parties at and prior to its execution, May 1, 1893. The rejected written instruments were, with one exception, of an earlier date than the contract, and consisted of letters from Mr. Mendenhall to the officers of the trust company, and an alleged list or schedule or liabilities prepared by him and transmitted pending the negotiations. The claims now in controversy were not in this list. The oral testimony was of conversations between Mr. M. and the officers, prior to the contract, tending to show that certain debts specified in the list, and none other, were covered by the words 'all of the outstanding indebtedness' of the Mendenhalls. The effect of this class of evidence, if received and relied upon by the court when making its findings, would have been to cut down and limit the liability of the trust company to the debts expressly mentioned in the list or schedule before mentioned as having been submitted by Mr. M. when he proposed to the company that it become trustee, but in no manner referred to or made a part of the contract, in which

it was stipulated that the indebtedness to be taken care of was 'all of the outstanding indebtedness of said second parties,' not exceeding $130,000. Not the debts or liabilities listed and scheduled at some prior time, and in which list no mention was made of the liability incurred when the Mendenhalls, either prior to the delivery, and for the purpose of giving additional credit thereto, or as endorsers—and it is not material which,—placed their names on the back of the James note, but all of the outstanding indebtedness. The phrase 'all indebtedness' included all pecuniary liabilities of each and both of the debtors, present, or already incurred, but to mature in the future. 'Indebtedness' is a word of large meaning, and is used to denote almost every kind of pecuniary obligation originating in contract. It must be held to cover the debtor's joint as well as his several liabilities, and also his liabilities contracted by indorsement, whether then due or to become due. Merriman v. Manufacturing Co., 12 R. I. 175; Railway Co. v. Lundstrom, 16 Neb. 254, 20 N. W. 198; City of Valparaiso v. Gardner, 97 Ind. 1; Scott v. City of Davenport, 34 Ia. 208. To give any weight to the evidence in question would be to vary a written contract by parole,

—make a new contract for the parties; for, as was said when the case was here before, the covenant to pay is clearly and concisely expressed,—has no uncertainty in its meaning,—and the promise was for the equal and ratable benefit of all the creditors. The character of conclusiveness is given to written instruments deliberately adopted by the parties as embodying their final agreements, and as to the terms, conditions, and limitations thereof the written contract must speak for itself. Nor will a party, under the guise of knowing what the real consideration of a contract was, be permitted to cut down or vary the stipulations of his written covenant by proof of a parol agreement, either antecedent to or contemporaneous with the writing. Bruns vs. Schreiber, 43 Minn. 468, 45 N. W. 861; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; 2 Pars. Cont. 680. The attempt to show that, prior to the execution of the contract in which the trust company agreed to pay all of the indebtedness, it was the verbal understanding that only a part should be paid, was properly excluded by the court below."

CONCLUSION.

Because of the facts appearing in the record before this Court as referred to in the foregoing argument and the cases cited, we contend that for the various reasons stated the claim of the Exchange National Bank, if at all allowed, should be allowed as that only of an unsecured creditor without preference or priority over the claims of appellants or any other of the creditors of the estate of the Stack-Gibbs Lumber Company, bankrupt, and without the right of securing unto itself the dividends payable to appellants, and which have long been withheld, and we ask that the order of the District Court appealed from be reversed and remanded with directions to deny the prayer of the petition of the Mechanics Loan & Trust Company and the Exchange National Bank.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,
Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and THE EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company, Bankrupt,
Appellees.

No........

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, BANKRUPT.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

APPELLEES' BRIEF

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APPELLES' BRIEF

STATEMENT OF CASE.

The order of the Referee complained of is in the record at pages 64-69. The decision of Judge Dietrich and his order affirming the Referee's order will be found on pages 78 to 87 of the record.

Several of the creditors mentioned in the order have not appealed to this court. Those not appealing are Fort Dearborn National Bank, S. H. Hess, Mrs. Tolerton, Idaho Timber Company, Shoshone Lumber Company and J. K. Stack. The amount of their claims as shown after their signatures to the trust deed (Record 57-58) is $350,000. The amount of the claims of the appellants is $288,000. Mr. Stack did not file any objections before the Referee; the others did.

On February 1, 1916, the trust deed was signed at Minneapolis. It was prepared by H. J. Aaron, a Chicago attorney. (Rec. 216.) He also signed the trust deed on behalf of the creditors, Merrill, Cox & Company and Fort Dearborn National Bank. The instrument was prepared and signed at a meeting of these creditors, being the principal creditors of the bankrupt, in the city of Minneapolis, except that it was not signed there by Mr. Stack, Mrs. Tolerton or Mrs. Gibbs. (Rec. 217.) At the same time in Minneapolis there was signed by these creditors a letter of instruction to the Mechanics Loan & Trust Company, which is as follows:

> "We, the undersigned creditors of Stack-Gibbs Lumber Company, have executed as creditors the deed of trust to you given by said company, and request that while you take possession at once of the property described therein and perform all your duties under said trust deed, *you shall not at this time place said deed of record* until you shall believe under the advice of counsel that it is necessary so to

> do in order to protect our rights in the premises, especially as against other creditors. We understand, of course, that if this deed of trust is not put of record it will be possible for the Lumber Company to make some conveyances of property, but we have not the slightest fear of anything of that kind being done, and feel that it is for the best interests of the creditors, as well as the Lumber Company, *that as little notoriety as possible be given to this trust,* and for that reason suggest you do not place said instrument of record until you feel the same is imperative." (Rec. 219.) (Italics ours.)

On February 2nd this letter and trust deed were mailed to Mr. Stack. He signed same and thereafter forwarded same to Mr. H. J. Aaron at Chicago to obtain the signature of Mrs. Tolerton, who there resided.

In Mr. Coman's letter to Mr. Stack, referring to the trust deed, it is said:

> "This arrangement has been the result of a conference of the different creditors of Mr. Gibbs' concerns representing more than ninety per cent. of the indebtedness. It seems to all concerned to be the best plan to conserve the assets of the concerns and at the same time protect the interests of the creditors.' (Rec. 218.)

Mr. Gibbs submitted to the creditors at Minneapolis a statement of his assets and liabilities, and these creditors figured that when the trust deed was signed by Mrs. Tolerton it would have been signed by creditors representing 90% of the debts of the company. (Rec. 220.) They were all

anxious that the trust deed be executed as soon as possible, and because of delay, Mr. Aaron, on February 5, 1916, telegraphed Mr. Coman as follows:

> "Contracts not yet returned by Stack. Can you hurry him."

And again telegraphed on February 7th:

> "Contract received. Now awaiting Mrs. Tolerton's signature. Will wire when secured."

And again on February 9th:

> "Contract signed by Mrs. Tolerton yesterday. Mailing this morning." (Rec. 222.)

On February 9th Mr. Coman wrote Mr. Stack:

> "I received a wire from Chicago that Mrs. Tolerton has signed and that finishes the execution of the agreement."

On the same day Mr. Coman wrote Mr. Aaron:

> "I am in receipt of a telegram under date of the 9th, advising that Mrs. Tolerton has signed the contracts. The trustee will go ahead and make the advances to take care of the payrolls due, in anticipation of the arrival of the contracts."

Mr. Gibbs, the president of the bankrupt, agreed that that might be done. (Rec. 224.)

Mr. Aaron answered that letter but made no objection to said advances being made. The trust deed provides in paragraph 21 thereof (Rec. 47-48):

> "It is further agreed that this instrument shall not take effect until * * * * the resignations of one of the directors of each of said companies, and that Sigmund Katz of Chicago,

> Illinois, shall be elected by said stockholders of said Lumber Company and said Mill Company a director and secretary and treasurer of each of said companies, and provided, further, that said Katz or any other person that the majority in amount of the creditors of the Lumber Company who shall sign the within instrument shall name, shall be elected and retained as such director and officer of such Lumber Company and such Mill Company until the trust created by the within instrument shall be terminated."

Mr. Aaron suggested Mr. Katz as the man to come out to Idaho and run the business. He said that by reason of their large interests here they were entitled to have their man on the job, and he knew him and that he was a capable man and familiar with the lumber business. (Rec. 225.)

On February 9th Mr. Aaron wrote Mr. Coman, enclosing the five copies of the trust deed and also copies of the letter which states to keep the trust deed off the record and keep the matter secret, and advised Mr. Coman to see that there was held a stockholders' meeting of each company and that Mr. Katz was elected director and secretary and treasurer of each company, and that Mr. Katz "is leaving Sunday for Spokane and will report the moment he arrives in your city." (Rec. 225-226.)

On February 15th Mr. Aaron wrote Mr. Coman acknowledging receipt of Mr. Coman's letter of the 9th inst. and stating that Mr. Katz had left Sunday night. When Mr. Katz arrived he presented a

letter of introduction from John Fletcher, the vice-president of the Fort Dearborn National Bank, stating:

> "This letter will introduce the bearer, Mr. S. Katz, who will call upon you within a few days to take up his duties in connection with the Stack-Gibbs Lumber Company. We have asked Mr. Katz to report direct to you, with the understanding that he will be made an officer and director of the two companies as arranged in the agreement." (Rec. 226-227.)

On February 15th a stockholders' meeting of the bankrupt was held and Mr. Katz was elected director, and on the same day, at a meeting of the board, he was elected secretary and treasurer. (Rec. 144.)

On February 18th the trust deed was authorized and ratified at a stockholders' meeting of the bankrupt. (Rec. 145.) On the same day it was approved at a directors' meeting of the bankrupt. (Rec. 146.) It was likewise approved at a directors' meeting and stockholders' meeting of the Dryad Company. (Rec. 147-148.)

As soon as the telegram from Aaron that Mrs. Tolerton had signed was received, the trustee commenced advancing money, which was in pursuance of the agreement between the creditors at Minneapolis. (Rec. 228.) Mr. Katz was told as soon as he arrived in Spokane that he would represent the trustee in the management of the business under

the trust deed. (Rec. 228.) Mr. Katz was an adverse witness, friendly to his Chicago friends who were objectors in this proceeding, and dodged as to the point that he was the representative of the trust company, but finally made this statement:

"Q. Did you have any talk with Mr. Coman about your being the man on the ground who would be the representative of the Mechanics Loan & Trust Company in doing those things, whatever was to be done?

A. I suppose it was taken for granted, but he didn't point it out specifically." (Rec. 166-167.)

Mr. Coman testified:

> "Mr. Katz and I had quite a conversation about the matter of his being in charge and which way he should handle the business under the trust agreement. I explained our views of the situation and told him it was necessary to handle it diplomatically, etc." Rec. 228.)

In March, 1916, the manager of the trust company wrote a letter to Mr. Katz, enclosing a copy of a letter received by the trust company from its attorney, F. T. Post, outlining the duties and responsibilities under said trust deed and asking Mr. Katz to prepare a general inventory as of the date "we assumed control under the trust deed" and also a statement of cash receipts "since we have been in charge," and advising that a letter be received from the Stack-Gibbs Lumber Company stating that it recognized Mr. Katz as the agent of the trust company. (Rec. 169-170.) Such letters

were promptly obtained by Mr. Katz and forwarded to the trust company. (Rec. 170-171.)

Mr. Post testified that he prepared the minutes and was present at the meeting of the stockholders and directors of these companies on February 18th, and at that time or before that meeting he had a conversation with Mr. Katz about the fact that Mr. Katz was representing the trust company, and the responsibility was upon him of running the business. (Rec. 258-259.)

The business was carried on in accordance with the provisions of the trust agreement until July 29, 1916, when the appellant Merrill Cox & Co and Fort Dearborn National Bank, through their attorney, Elmer H. Adams, and one other creditor, filed a petition in bankruptcy, commencing this proceeding. The trust deed was kept off the records in accordance with the letter of instructions from the creditors until that time when it was filed for record. Advancements amounting to $100,000 were made from time to time by the trust company in accordance with the trust deed. Mr. Katz wrote various letters to the trust company enclosing notes for these advancements. All the notes, with the exception of two for the total sum of $10,000, were made payable to the trust company. With each note was a letter substantially in the form of Exhibit 27 (Rec. 185) as follows:

> "Herewith our ninety-day notes Nos. 7414 and 7415 for $5,000 each, which kindly discount, depositing proceeds to our account at

Exchange National Bank, Spokane, Washington, advising us of the amount of discount."

The capitalization of the trust company was only $10,000. (Rec. 218.) That the trust company would get the $100,000 to be advanced from the Exchange National Bank was talked over and understood at the Minneapolis meeting. (Rec. 217, 276-280.) The Exchange National Bank signed the trust deed as creditor for $6,000 (Rec. 57), and that was the total indebtedness owing to it by the bankrupt.

The statement in the appellants' brief, page 10, that the Exchange National Bank kept in touch with the affairs of the bankrupt, is incorrect. On the other hand, Merrill, Cox & Company had had before this an accountant go over the books of the bankrupt. *None of the creditors who signed this trust deed gave* any testimony during the trial, *either in person or by agent or representative, except per Sigmund Katz.*

The statement on pages 10 to 12 of appellants' brief about the account of the bankrupt with the Exchange National Bank is not correct and will be gone into quite fully hereinafter.

The suggestion on page 12 of appellants' brief that Mr. Coman knew any more about the "precarious financial condition" of the bankrupt than did the other creditors in Minneapolis, is incorrect.

The statement on page 28 of appellants' brief

that the trust company is a "subsidiary" of the Exchange National Bank, is incorrect, unless the following facts make it such. Mr. Coman is the president of the bank and a member of the board of the trust company. The other members of the board of the trust company except Mr. Rea are also on the board of the bank, and officers thereof. The evidence does not disclose who owns the stock of either concern.

The statement on said page 28 that "every statement as to assets and liabilities" of the bankrupt has been false and that the company had long been absolutely insolvent, is not supported by the record. The statements made by Mr. Gibbs at Minneapolis or elsewhere as to the assets, either writen or oral, are not in the record.

The evidence does not disclose that the trustee in bankruptcy had converted the assets of the bankrupt into cash at the time of the trial. Of course some of the assets have been converted into cash, but some have not.

During the progress of the trial before the Referee, and because of objections made by counsel that the trust company could not have the preference because it did not take the $100,000 out of its own vaults but got the same from the bank, the bank filed a petition setting forth the facts and praying that the claim be allowed in the name of the trust company. The signing creditors answered

the petition and the two matters were consolidated. (Rec. 22, 60, 235, 275-6.)

The petition of the trust company, as well as the petition of the bank, asked that this claim of $100,-000 and interest be a preferred claim as against the trust, and if that be denied, that then the claimant be adjudged "entitled to have any and all dividends and sums that may be found by this court to become due and payable to the persons and corporations hereinabove particularly mentioned as signing said agreement, until the full amount of advancements as hereinabove set forth, together with interest at six per cent. per annum, be paid to the claimant herein, and before any money whatsoever from said estate are applied in liquidation and satisfaction of any of the indebtedness of the above-named creditors." This is based upon the provisions, terms and conditions set forth in the trust deed made on February 1, 1916.

Other facts will be referred to hereinafter.

ARGUMENT.

Objections to the allowance of the claim of the trust company were filed by the trustee in bankruptcy and also by all of the signing creditors except Mr. Stack. As stated above, only three of said signing creditors are now appealing. The objections of the signing creditors are thirteen in number. (Rec. 18-20.) Those numbered 4, 6, 8, 9, 10, 11, 12 and 13 may be summarily disposed of.

Nos. 4 and 6 are to the effect that the trust deed was not executed by the objectors or by the trust company, and that the trust company did not extend the Dryad mortgage as provided in said trust agreement. The evidence was to the contrary, and those objections are now waived.

No. 8 is to the effect that the trust company caused the bankruptcy proceedings to be instituted. There is no such evidence. It is not true. The bankruptcy proceeding was instituted by Merrill, Cox & Co and the Fort Dearborn National Bank and one creditor who did not sign the trust agreement.

Nos. 9 and 10 are to the effect that the trust company *negligently* collected the debts of the company and was guilty of gross neglect of the trust imposed on it. There is no evidence to sustain any such charge. The entire record shows the contrary. We believe there is no such contention in appellants' brief, but if there is, it will be noticed when reached.

No. 11 states that the signing creditors are not bound by the trust deed because of false and fraudulent representations made by "C. D. Gibbs, Stacks-Gibbs Lumber Company and Dryad Lumber Company." Manifestly, as between the trust company and said creditors, this charge, if true, would be wholly immaterial, but there is no such evidence. None of the creditors signing the trust agreement

have given any testimony on any subject in relation to this controversy. There is no contention in the objections that either the trust company or the Exchange National Bank made any representations of any kind. Furthermore, there is no evidence on that subject.

Nos. 12 and 13 are to the effect that the trust company did not comply with the laws of the State of Idaho relating to foreign corporations. The evidence shows to the contrary, and during the hearing the point was waived. (Rec. 256.)

The *objections* which require any notice or comment will therefore be divided into three heads:

> 1. That the United States District Court, sitting in bankruptcy, had no jurisdiction to determine the rights of the trust company and bank as to any part of the fund as against the creditors signing the trust deed. (Objections No. 1.)
>
> 2. That the trust company is not the owner of the notes attached to its petition; that it did not loan the money represented by said notes; that it did not advance $100,000 or any part thereof under the terms of the trust agreement. (Objections 2, 3 and 7.)
>
> 3. That the trust deed was not signed by creditors representing 90% in amount of the indebtedness of the bankrupt. (Objection No. 5.)

The charge of *bad faith* now contained in appellants' brief and so vehemently discussed on pages 95 to 116 thereof is *not* alleged in the formal and

explicit *objections*, nor is any such objection found in the record.

During the progress of the hearing and because of the frequent objections that the trust company was not the real party in interest, the Exchange National Bank filed a petition herein setting forth the same facts in substance as those contained in the petition of the trust company, and prayed that the claim of the trust company be allowed to the trust company and that the trust company have a preference as prayed for therein. (Rec. pp. 22-30.)

It is stated in said petition:

> "This petition is made and filed for the purpose of removing any possible doubt as to the party who is entitled to have said claim allowed, and any and all possible technical objections in relation to said claim of the Mechanics Loan & Trust Company."

The trustee and the signing creditors, namely, these appellants and others, filed a formal answer to said petition. (Rec. pp. 60-64.) That answer admits the execution of the trust deed, the corporate capacity of the bank and the trust company, and denies that the trust company advanced or caused to be advanced to the bankrupt the sum of $100,000 or any part thereof, and affirmatively alleges as follows: That the notes referred to were made by the bankrupt, payable to the trust company, and the trust company "endorsed said notes without recourse and said notes were then delivered to the Exchange National Bank of Spokane,"

and that the bank, upon the receipt thereof, advanced to the bankrupt the amount of said notes less the discount, and that the trust company never received any consideration from the bank nor paid any consideration to the bankrupt on account of said notes, and that

> "these respondents therefore deny that the Mechanics Loan & Trust Company is entitled to any preference of any kind or character as averred, and aver that the owner of said notes is the Exchange National Bank of Spokane, Washington, and that it is not entitled to any lien of any kind or character upon any of the assets of the Stack-Gibbs Lumber Company or of any moneys now in the hands of the trustee or to any dividend or dividends payable to any other creditor or creditors whomsoever, and these respondents deny that the Exchange National Bank or the Mechanics Loan & Trust Company are entitled to any relief whatsoever, and pray that the petition of said Exchange National Bank be dismissed at the cost of the petitioner."

Thereupon the record shows the following, pages 275-6:

> "Counsel for the objectors stated that they had filed answers to the petition of Exchange National Bank. Counsel for all parties stipulated that the petitions of the trust company and the bank and the proceedings thereon might be consolidated.
>
> THE REFEREE: The record may show that the amended claim of the Mechanics Loan & Trust Company and the petition of the Exchange National Bank, being consolidated, are to be tried together and considered together as one proceeding."

We call attention to this at this place for the purpose, among other things, of pointing out to the court that the formal answer, verified and filed February 20, 1917, like the formal amended objections vertified and filed January 6, 1917, *contains no charge of bad faith* on the part of either the bank or the trust company, and that this charge in the appellants' brief is not properly for consideration by this court. That issue was never tried.

In considering each and every one of these objections, we submit that the court should have in mind the principle stated in the case, In re Chase, 124 Fed. 753, quoted with approval by the Supreme Court of the United States in Hurley, Trustee in Bankruptcy v. Atchison, Topeka & S. F. R. R., 213 U. S., p. 132, as follows:

> "In In re Chase, 59 C. C. A., 629, 631, Circuit Judge Putnam, delivering the opinion of the Circuit Court of Appeals of the First Circuit, says: 'It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy, 7th Edition, 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received a fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery.'"

JURISDICTION.

The appellees are not seeking to obtain a lien upon any money *in custodia legis* by the process of attachment or writ of granishment, which is the point involved in nearly all of the cases cited by the appellants. The trust deed signed by the bankrupt and all of the large creditors of the bankrupt grants to the trust company two specific rights whereby the trust company can recover back all moneys advanced and all expenses and legitimate disbursements:

(a) A lien upon all of the property of the bankrupt.

(b) An equitable assignment of the claims of the signing creditors. .

The Referee held that the trust company could not enforce its lien as against the whole estaate of the bankrupt, but could enforce it as against the signing creditors. The signing creditors do not contend for the invalidity of that part of the Referee's decision which denies enforcement against the whole estate.

It is apparent that if Judge Dietrich's decision affirming the Referee's order is overturned, the trust company and the bank are practically without any relief. The signing creditors reside in almost as many different states as there are creditors, at least five different states. If there is any remedy at law, it is wholly inadequate.

One of the cases cited by appellants is In re Hollander, 181 Fed. 1019. The question involved was whether or not permission will be granted to *attach* in the hands of a trustee money belonging to a creditor of the bankrupt. In accordance with the weight of authority, the application is denied, but in the opinion the court states the following principle:

> "Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions."

This question of jurisdiction is settled beyond controversy by the Supreme Court of the United States in Whitney v. Wenman, 198 U. S. 539, the court saying at page 552:

> "We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in

the Federal courts. In re Whitener, 105 Fed. Rep. 180; In re Antigo Screen Door Co., 123 Fed. Rep. 249; In re Kellogg, 121 Fed. Rep 333. In the case of First National Bank vs. The Chicago Title & Trust Company, decided May 8 of this term, ante, p. 280, in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

One of the cases cited in the above opinion is In re Antigo Screen Door Co., 123 Fed. 249. In that case the court said at page 251:

"We take it that any court, whether one of equity, common law, admiralty or bankruptcy, having in its treasury a fund touching which there is dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court. Havens, et al., v. Pierck, Trustee, 120 Fed. 244; In re McCallum, 113 Fed. 393. If otherwise, every court would be subject to the control of the coordinate courts, working havoc to the independence of judicial authority. A fund so possessed is in *custodia legis*, and right to it may only be asserted and determined in the court which possesses it."

To the same effect is the opinion in the case, In re Whitener, 105 Fed. 180, also cited in the Supreme Court's opinion.

The case, In re Paris Modes Company, Bankrupt. 196 Fed. 357, is very like the case at bar. There was a distribution of the fund between the parties according to a certain agreement made between them, which was enforced by the court in bankruptcy.

The distinction between a garnishment or an attachment and the equitable distribution of a fund in the bankruptcy court, according to the claims of the respective parties thereto who have appeared in the bankruptcy court, is clearly stated by the Supreme Court of Maine in Rockland Savings Bank v. Albin, 68 Atl. 863.

The authorities cited by the appellants in no manner militate against our position. The first cited case is to the effect that the Federal Court sitting in bankruptcy is a court of limited jurisdiction. (Appellants' Brief, 33-36.)

The United States District Court is, of course, a court of limited jurisdiction. In fact, as said by the Supreme Court of the United States in Windsor v. McVeigh, 93 U. S. 274, 282:

> "All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action. * * * Though the court may possess jurisdiction of the cause, of the subject-matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by law."

In the Taft case, 141 Fed. 369, cited in appellants' brief, at page 33, the question was as to the sufficiency of the petition in involuntary bankruptcy. The court held that the petition was insufficient, but nevertheless held that the petitioner should be given an opportunity to amend his petition so as to comply with the statute.

In the Edelstein case cited in appellants' brief, page 34, this person was found guilty of making a false oath in relation to the bankruptcy proceeding against himself and his partner. The defense was that the court had no jurisdiction of the bankruptcy proceedings. The court found that the petition in involuntary bankruptcy was insufficient, but that hearing had been had thereon and adjudication of bankruptcy made, and the bankrupt had applied for a discharge from his debts, and that the judgment was not void and not subject to collateral attack. The conviction was affirmed.

In the case, In re Columbia Real Estate Co., 101 Fed. 965, cited in appellants' brief, page 34, what the court said at page 970 is:

> "If, as insisted by counsel, the bankruptcy court is, in a technical sense, a court of inferior and limited jurisdiction, every fact essential to its jurisdiction must affirmatively appear on the face of the record. It is true, the bankruptcy court is one of limited jurisdiction, and the Constitution describes all courts of the United States except the Supreme Court as inferior courts. But the Circuit and District Courts of the United States as courts of bank-

> ruptcy are courts of record, and as such, are not inferior courts in the sense that jurisdiction must necessarily appear upon the face of the record."

That the case, In re Girard Glazed Kid Co., 136 Fed. 511, cited in appellants' brief, page 36, does not support appellants' position, but in fact supports appellees' position, is apparent from a careful reading of the opinion. The court said that the controversy

> "concerns a sum of money that came into Barbara Swartz's possession at that time (before the petition in bankruptcy was filed) and has remained in her possession ever since;"

also,

> "It is an independent controversy about the ownership of money *that is not a part of the fund for distribution*, and this court cannot take jurisdiction of the dispute and decide it in the roundabout manner that has been suggested."

In other words, the moneys in controversy were not and never had been in the possession of the trustee in bankruptcy.

In the case at bar, each and every one of the parties to this proceeding is in the bankruptcy proceeding as a creditor who has filed a claim therein. Here particular creditors, the trust company and the bank, assert that there was advanced $100,000 and the same was used for the benefit of the bankrupt and the creditors signing the trust deed, and that the same was done at the instance of said sign-

ing creditors under a written contract (trust deed) whereby it was agreed that the trust company should have a prior and preference claim for the moneys advanced and expenses incurred and that the same should constitute a charge upon the trust estate superior to and to be paid before any moneys were paid out of said trust estate to said signing creditors. In other words, that said trust company has by virtue of the contract become assignee in equity of the claims of said signing creditors and of the fund which would otherwise go upon distribution to said signing creditors, and that said fund is in the hands of the trustees in bankruptcy. No court has held contrary to our contention, and the principles enunciated in all these decisions sustain the same.

That the assignee of a claim against a bankrupt has the right to file and enforce his rights in the United States District Court sitting in bankruptcy, cannot be questioned. Otherwise he would be without remedy. See:

In re Miner, 114 Fed. 998;
In re Miner, 117 Fed. 953 (On Rehearing);
In re Breakwater, 232 Fed. 375.

The distinction between such a case and a case where an outsider sues at law and undertakes to create a lien in *custodia legis* through legal process, either garnishment or attachment, is recognized by all the authorities, and a very lucid discussion thereof is contained in the opinion of the Supreme

Court of Maine in the Rockland Savings Bank case, 68 Atl. 863, cited above.

The case in 211 Federal (appellants' brief, p. 39) and the two cases (appellants' brief, p. 41) and the case in 187 Federal (appellants' brief, p. 42) are all either garnishment or attachment cases.

The statement on page 42 of appellants' brief that this proceeding is delaying the settlement of the bankruptcy proceeding is not supported by any evidence in the record and is untrue in fact.

The Nebraska case (State court), appellants' brief, page 43, is not in point. This appears to be an action brought by a trustee in bankruptcy in the State court against the estate of Hulst, deceased, and there is an interpleader by the State Bank of Columbus against the First National Bank, neither one of which appears to have been a party to the suit. The opinion does not decide the question of jurisdiction or any question as to procedure, but holds that the State Bank does not have the right to enforce the contract referred to against the National Bank because the National Bank was not a party thereto. A careful reading of the opinion will demonstrate its inapplicability.

The next question presented in appellants' brief is that inasmuch as the trust company in its petition claimed a preference lien on the entire trust estate, and if that was denied, a preference lien upon the claims of the signing creditors, or that

the proportion of the fund in the trustee's possession which would otherwise go to the signing creditors should be paid to the trust company until the trust company has received the full amount of its claim under the provisions of the contract, and the court having refused one relief, then the court is *without jurisdiction* to grant the other relief prayed for. (Appellants' Brief, pp. 43-44.) The mere statement of their contention demonstrates the absurdity thereof.

No court has ever held that because a pleader prayed for several kinds of relief and was denied one kind, that the court would refuse him any relief whatever. Counsel go further and contend not only that the court should refuse any relief whatever, but that the court has no *jurisdiction* to grant any relief whatever, because under the evidence one kind of relief must be denied.

They say that the lower court must have found the trust deed null and void. The Referee does not state in his decision the reason for denying a relief as against the trustee in bankruptcy. It may be that it was because of the letter signed by the large creditors directing the trust company not to put the trust deed of record and keep the same a secret; and that the trust company obeyed those instructions. (Rec. 219.) Of course the trust deed might not be enforcable against the non-consenting creditors, when it would be enforcable against the signing creditors. The appellants do not boldly

and baldly state that they are seeking to repudiate their own contract. Such is the fact, however.

Pages 45 to 61 of appellants' brief are devoted to quotations from authorities on the subject that when an action is brought in equity and the court refuses equitable relief, it will not enter a money judgment upon a note or for damages,—in other words, strictly legal relief,—and for the reason that to do so would be to deprive the parties of their constitutional right of trial by jury. Why the citation of these authorities, we know not, as their lack of relevancy to the instant case is apparent..

There are some exceptions to this well established rule, well known to the court, which are also unnecessary to comment upon herein.

The decisions of the Supreme Court of the United States noted in the authorities cited have been referred to in a more recent case of that court which is something like the case at bar, and their inapplicability pointed out. (Tyler v. Savage, 143 U. S. 79, 96.)

In the case last cited is an expression of that court which is quite pertinent:

> "Under Section 723 of the revised statutes, the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

In Walla Walla v. Walla Walla Water Company, 172 U. S., pages 1, 12, the court said:

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Manifestly, a remedy at law to be efficient must be a remedy in the same jurisdiction, not in some foreign jurisdiction.

In the instant case, either the trust company has a remedy in this proceeding or it is without remedy. It would be neither practical nor efficient to bring a suit in Nebraska against appellant Searle, another suit in Illinois against Merrill, Cox & Company, another against Minnie A. Gibbs (residence unknown), another against Fort Dearborn National Bank, Illinois, another against First National Bank of Lincoln, Nebraska, another against Shoshone Lumber Company and Idaho Timber Company, each Minnesota, another against J. K. Stack, Michigan, and so on. If such suits were brought, they would be in equity to establish the trust company's right to that part of the fund of the bankrupt estate otherwise going to the defendant therein under said agreement. The trustee in bankruptcy must be a defendant in order to obtain the fruits of a victory. His residence is in the State of Idaho. This would not be "efficient to the ends of the justice and its prompt administration" nor practical, or adequate. The only practical pro-

ceeding is one which brings in the trustee in bankruptcy and all the signing creditors in one proceeding. The only way possible to do that is in this bankruptcy proceeding and by the method adopted herein. To deprive the appellees of this procedure would be to deprive them of all remedy.

On page 59, brief, appellants cite the Henry case, 145 Fed. 316. The following quotation therefrom shows its impertinence:

> "This is not a case in bankruptcy in any sense of the word. It is not contended that either the plaintiff or defendant were parties to the proceeding before the referee in bankruptcy."

In the instant case all of the parties were parties to the proceeding in bankruptcy. They were all creditors and in court. It was the duty of the trustee to distribute the fund to the parties who had a right thereto. It was the duty of the court to determine that question.

On pages 62 to 65, brief, appellants criticise Judge Dietrich, and in doing so, misstate the record, due, doubtless, to their lack of appreciation thereof. It is true that counsel for the appellants made an oral argument and filed an extensive brief with Judge Dietrich. The expression quoted at page 62, brief, begins near the bottom of page 84 (Record). To get the connection and appreciate what the learned judge refers to, you must turn to the bottom of page 83, Record, where he says:

> "Thus far I have not referred to contention

> made by counsel 'for creditors whose debts were incurred by the trustee,'"

and so on.

It is a fact, well known to the author of appellants' brief, that Mr. Whitla, as attorney for some of the creditors whose debts were created between February 1st, the date of the trust deed, and July 29th, the date of the bankruptcy proceeding, and now unpaid, made an oral argument before Judge Dietrich and filed a brief with him. He is the counsel and those are the creditors referred to in the quotation made above and in the quotation made in appellants' brief. Counsel must have forgotten that; otherwise they would not have indulged in this criticism of Judge Dietrich.

REAL PARTY IN INTEREST AND RIGHTS OF BANK AND TRUST CO.

Under this heading we will discuss the two points made in appellants' brief, pages 65 to 95. It is contended therein, first, that certain evidence was inadmissible, and that inasmuch as the trust company did not get the $100,000 out of its own vaults but got it from the vaults of the Exchange National Bank, neither party would have a right to the adjudication complained of except for this inadmissible evidence; and second, that the bank is a mere volunteer, and even though the evidence complained of were admissible, that neither the trust company nor the bank could recover herein.

Appellants have a long and learned discussion on the subject of *subrogation.* As we deem that the principle of subrogation is not involved in this matter, but quite a different principle, which we have discussed below, we make no further reference thereto.

Paragraph 1 of the trust deed provides that the trustee shall have the power "to incur all proper expenses in connection therewith as in its judgment shall seem to the best interests of all the parties hereto, as though it was the absolute owner thereof." (Rec. 40.)

Paragraph 2 provides that the trustee may operate the mills, cut logs, etc., "and in carrying on such business it may incur such expense as it thinks necessary."

Paragraph 3 provides that the trustee may employ such persons as it deems necessary and "may pay persons so employed reasonable compensation."

Paragraph 6 provides a compensation for the trustee, and that the trustee "shall be entitled to reimbursement for sums paid for legal services."

Paragraph 8 provides that the trustee may bring or defend any suit which it considers advisable to the protection of the trust estate, and "it shall be repaid from the trust estate all liability, cost and expense to which it may be put in the course of such litigation."

Paragraph 9 provides that if in the management of the estate damage is done to third parties to whom the trustee may be held liable, "the trustee shall be reimbursed and indemnified against any liability or claim therefor."

Paragraph 10 provides:

> "The trustee shall advance such sums of money as it shall deem necessary to meet the present payroll of the lumber company and the mill company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of $100,000, and the trustee shall have a first and preference claim upon said trust estate for the amount of such advancement, and the same shall be repaid to it out of the first proceeds of sale of the trust property or any part thereof or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of 6% per annum."

Paragraph 11 provides that payments made by the trustee under the provisions of Section 1 to 10, as well as the compensation of the trustee, "shall be deemed maintenance charges of the trust estate and shall be paid from the proceeds of the trust estate *in preference to any other claims thereupon.*"

Paragraph 14 provides that this instrument is entered into in pursuance of a plan which is considered equitable between all the creditors of the

lumber company and the mill company, and which will secure the most advantageous disposal of the property for the benefit of the creditors, and that the creditors agree not to sue either company, and "that the trustee would not have consented to act as trustee hereunder or to assume the obligations herein assumed by it except upon the express agreement of the creditors in this section contained."

Paragraph 15 provides that the trustee may employ agents and that it shall not be held liable for any neglect, omission, mistake or misconduct of any such agent, and "shall not be held liable for any loss or damage not caused by its own negligence or default."

Paragraph 18 provides that the creditors signing the said instrument shall file with the trustee their claims against each company and that "the proceeds of the trust estate, after reimbursing the trustee for advancements, expenses, compensation and other claims mentioned herein, shall be distributed pro rata among the creditors."

Paragraph 19 provides that "the compensation of the trustee and expenses incurred and advancements made by it shall constitute a charge upon the trust estate *superior to the indebtedness of any party secured hereby*, and the trustee may not be removed nor be deprived of the trust estate in any manner until the payment of" same. It also provides that in case the trustee named shall refuse to

act, the creditors signing the instrument, by a majority vote, may appoint a new trustee.

It is not stated in the instrument that the trustee must pay every expense incurred and take every advancement made out of its own coffers, and that if it borrowed any of the moneys so paid or advanced it would not have any lien for the repayment thereof under this instrument. Manifestly, neither the creditors nor the bankrupt had any such absurd idea. Such, however, is the argument of counsel. What every court seeks to ascertain in construing a contract is the intention of the parties. It was of course immaterial either to the bankrupt or the objecting creditors where the money came from. The purpose and intent of the contract was to have somebody advance such sum of money as the trustee might think necessary, with a limit of $100,000, and that the Trust Company or such creditor should have a first lien upon the assets of the bankrupt and a first lien upon the interests of the signing creditors. For repayment of same such lien or charge being given as an inducement to advance the money. The habendum clause in the trust deed has the expression, "and its assigns."

In Washington & Idaho R. R. Co v. Coeur d'Alene R. R. Co., 160 U. S., page 77, it is said at page 101:

> "When a court of law is construing an instrument, whether public law or private contract, it is legitimate if two constructions are

> fairly made possible to adopt that one which equity would favor."

In Utley v. Donaldson, 94 U. S. 29, the Supreme Court said at page 46:

> "Every intendment is to be made against the construction of a contract under which it would operate as a snare."

In Secombe v. Steele, 20 Howard, 94, the Supreme Court used the following language:

> "In Parkin v. Thorald, (16 Beav., 59) the master of the rolls said: 'A contract is undoubtedly construed alike both in equity and at law; nay, more—a court of law is the proper tribunal for determining the construction of it. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A has contracted to sell an estate to B, and to complete the title by the 25th of October; but no stipulation is introduced, that either party considers time of the essence of the contract. A completes the title by the 26th; at law the contract is at an end, and B may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds, that unless B can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action or to avoid the performance of the contract; not, certainly, on the ground that the 25th of October was not a part of the contract, but on the ground that it is unjust that B should escape the performance of a contract which has been substantially per-

formed by A, by reason of some omission in a formal but immaterial portion of it.' Upon a view of the chancery record, our conclusions are, that the plaintiff, in good faith, attempted a literal performance of his contract with Taylor; that the deposit of the money due, in a bank of solvency and credit, other than those named in the contract, did not inflict an injury upon Taylor, and the offer of its certificate of deposit, *prima facie,* was a substantial performance of its requirements."

In Joy v. St. Louis, 138 U. S., pages 1, 38, the court said:

"The two agreements of August 11, 1875, and the deed of that date from the County Company to the Kansas City Company constituted a single transaction relating to the same subject-matter, and should be construed together in such a way *as to carry into effect the intention of the parties, in view of their situation at the time, and of the subject-matter of the instruments.*"

In Insurance Co. v. Dutcher, 95 U. S. 269, 273, the court said:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more but rarely less than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice dur-

> ing the period mentioned as a factor in the case."

In this connection we call attention to the fact that the notes were always given to the trust company; that with each note was a letter signed by Mr. Katz, who was sent to have charge of this trust by these objecting creditors, and that the letters universally requested the trust company to discount the notes at the Exchange National Bank and have the money put to the credit of the bankrupt (Rec. 185), and that Mr. Katz repeatedly wrote Merrill, Cox & Company and others that the moneys thus obtained were advanced under and in pursuance of the trust agreement; that no objection was ever made by an creditor to this method of procedure, and that the bankrupt itself knew the entire transaction and acquiesced in it. That the objection made is without substance is apparent. The signing creditors, as well as the bankrupt, are presumed to have some knowledge as to the financial condition of the trust company and its capacity to carry the contract. The situation of the affairs relating to a contract at the time the contract was made is always admissible in evidence as an aid to the court in determining the intention of the parties, which is most often poorly expressed in the written language.

The trust company was capitalized for only $10,000 and had but little financial standing. The parties were presumed to know this. Anyway, they

were so told by Mr. Coman at the time the trust deed was in preparation.

Mr. Coman was neither president, vice-president, secretary or treasurer of the trust company. He was, however, a member of its board of trustees. He was president of the Exchange National Bank. Counsel state that the trust company was a subsidiary of the bank. Anyway, the close affiliation was a matter of common knowledge. The president of the trust company was the vice-president of the bank. The trust company, having very little means, would naturally go to the bank to borrow the money to be advanced. Mr. Coman testified that that was talked about at the time the contract was being prepared. Counsel make serious objection to this testimony. It does not vary or change the terms of the written contract. It is patent without the testimony that the parties understood exactly what would be done. That is shown by the correspondence and by the conduct of their representative, Mr. Katz.

There can be no controversy over the fact that the trust company would have had the right to have repaid these advancements and expenses provided it had realized out of the sale of the assets, before it was superseded in bankruptcy, a sufficient sum of money to pay the same. The contention is that, not having actually paid the money, and although the advances were all made in absolute good faith and in reliance upon the trust deed,

neither the trust company nor the bank can have a preference claim.

In Randolph v. Scruggs, 190 U. S. 533, the question of the right of a bank in its own name to proceed against the trust fund was passed upon. A mercantile company made a general assignment for the benefit of its creditors. The assignee accepted the trust. The deed of assignment provided that the assignee should pay reasonable attorney's fees for preparing the deed and for advice and services to be furnished in the course of administration. Within four months after making this deed of assignment, the mercantile company was adjudicated a bankrupt. The attorneys filed a claim in the bankruptcy court for professional services rendered in preparing the deed of assignment, etc. Certain questions were certified to the United States Supreme Court. On the question of the right of the attorneys to file a claim in their own name, the court said at page 538:

> "We may assume that there is no question of form before us and that whatever the appellants' properly might have been paid by the assignee, they may make proof for now."

Citing among other cases, Mason v. Pomeroy, 151 Mass. 164; 24 N. E. Rept. 202.

The Supreme Court also said on page 539:

> "The services to the voluntary assignee may be allowed so far as they benefited the estate, and inasmuch as he would be allowed a lien on the property if he had paid the sum allowed,

> the appellants may stand in his shoes and may be preferred to that extent."

It is immaterial whether such lien is asserted by the trust company or the bank, inasmuch as both of them are in court in this proceeding, both asking to have it asserted, and there is no conflict between them, and which one of them gets the money is a matter in which neither the bankrupt nor the signing creditors can have any interest.

The Massachusetts case cited in the Supreme Court decision is instructive. A bill in equity was filed by certain creditors to establish a lien upon a trust fund. It appears from the opinion that Mr. Pomeroy by his will devised a manufacturing plant to three trustees in trust to continue and carry on the business until his son's arrival at the age of 21 years. The bill was demurred to because (a) the plaintiffs had no equity, as they did not offer to make good to the trust fund the losses occasioned by the trustees, and (b) that the plaintiff's sole remedy was at law. The court said:

> "Where trustees are authorized to carry on a business and contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity as applicable to the facts and circumstances which may exist in any case."

That court also said:

> "The view, however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to

> be indemnified therefrom, and that the creditors reach it by being substituted for the trustees and standing in their place."

Citing among other cases, In re Johnson, 15 Chancery Division, 548, which is in point.

In re Chase, 124 Fed. 753, is cited in the United States Supreme Court decision referred to above, Hurley Trustee v. A. T. and S. F. R. R., 213 U. S. 132. That case is pertinent. A storekeeper made a general assignment for the benefit of creditors. The assignee took possession and held the same until the assignor was adjudicated a bankrupt. The assignee was petitioner in bankruptcy for compensation for disbursements and for services. The court held that the assignee had a lien for disbursements and the reasonable value of services. The second head note is:

> "That such assignees paid to the trustee in bankruptcy the gross amount received by them and surrendered all other assets in their answer did not deprive them of the right to apply to the court for the payment of the amount of such lien."

The fourth head note is:

> "An assignment for the benefit of creditors fairly made and intended to facilitate the equal distribution of the insolvent's property among his creditors without any attempt to defraud or embarrass persons to whom he was indebted, is not contrary to the policy of the bankrupt law, as to preclude the assignee from recovering for disbursements and services made for

> the benefit of the estate prior to the filing of the bankrupt's petition."

The third head note states the principle cited with approval in 213 U. S., page 132, as follows:

> "The rule applied that trustees in bankruptcy have no equities greater than those of the bankrupt and sometimes will be ordered to do full justice even in some cases where the circumstances give rise to no legal rights and perhaps not even to a right which could be enforced in a court of equity as against an ordinary litigant."

The court said on page 760 as follows:

> "On the whole, it is plain that, under the special circumstances of many cases of this character, there may arise a strong equity in favor of such allowances as are now claimed, and that there is no provision of statute, and no declaration of any court of authority, holding that, as a matter of law, they should never be granted. On the other hand, so far as there are any indications which we are bound to regard, they are to the contrary. Therefore, in the present case, the District Court should ascertain and determine whether, under all the circumstances, the petitioners are equitably entitled to their disbursements, or any part thereof, reasonable allowances for their services, and protection against outstanding claims for rent. None of these matters should be disposed of on any arbitrary rule of law that neither class of allowances can be made, but they should be determined according to what is reasonable and equitable in view of all the conditions.

Since this was prepared, the Supreme Court passed down its opinion in Randolph v.

> Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed..........., which assures us that the conclusion reached herein is correct. Nevertheless, Randolph v. Scruggs does not cover all the details involved at bar. Moreover, the directions and accompanying explanations herein contained seem necessary for the guidance of the District Court. We note, however, that Randolph v. Scruggs, at page 539, 190 U. S., page 712, 23 Sup. Ct., 47 L. Ed..........., is careful to hold that an equitable and reasonable allowance for the services of assignors like the petitioners is for only such as have 'benefited the estate.' Therefore that limitation, and all the phraseology of the opinion in Randolph v. Scruggs, must be understood as adopted by us. Summers v. Abbott, 122 Fed. 36, decided by the Circuit Court of Appeals for the Eighth Circuit, sustains our conclusions, although it omits the limitation imposed by the Supreme Court."

It has not been and cannot be suggested that the advancement of the $100,000 was not a benefit to the estate. Judge Dietrich, as well as the Referee, expressly so held. But that question can have no relation to the agreements between the creditors themselves. The signing creditors having agreed that the advancements should be a charge against their dividends, and having appointed an agent to run the business, could not claim that such lien should not be enforced because of any mistakes of such agent or because the business did not turn out as well as anticipated. The trust agreement contains no such limitations. On the other hand, it provides that the trust company shall be protected from loss.

See Atchison, Topeka & S. F. R. R. Co. v. Hurley, 153 Fed. 503. The first head note is:

> "The administration and distribution of the property of bankrupts is a proceeding in equity and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both."

The third head note is:

> "Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation."

This last quotation bears upon the conversation between Mr. Coman and the signing creditors in Minneapolis, wherein they all understood that the trust company had very little funds and the bank was to advance the money. In the opinion the court says at page 509:

> "We find it unnecessary to consider the interesting question debated at the bar, whether the oral agreement was such a substantial modification of the original one as distinguished from a change in detail of performance, as required it to be in writing and conform to the statute in question. It sufficiently appears that the railway company fully performed its part of the agreement. It advanced the money as agreed, but the coal company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral understanding against one who, at his invitation and in reliance upon his promise, has expended

> money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed."

In relation to this question of the admissibility of the oral testimony of Mr. Coman as to what was said at Minneapolis about the bank advancing the money at 6% interest and having the benefit of the charge or lien under the terms of the trust deed, (Rec. 276-280) we beg also to cite Ford v. Williams, 21 Howard 289, wherein, in the opinion, it is said:

> "The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parole, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction."

This case has been often cited. See the following:

Curran v. Holland, 75 Pac. 46;
Escondido Oil & Dev. Co. v. Glaser, 77 Pac. 1040;

Battey v. Lunt, Moss & Co., 30 R. I. 2; 136 Amer. St. Repts. 926.

Bramble v. Brett, 230 Fed. 385, is quite similar to the case at bar. Stalcup, an insolvent merchant, met his creditors and made a trust deed of substantially all his property to Bramble, in trust, to

take possession, sell merchandise, pay creditors, etc. Bramble took possession and thereafter Stalcup was adjudged a bankrupt. Bramble filed a claim in bankruptcy, seeking to be paid out of the estate "before the distribution to creditors" a certain sum of money for services, a certain other sum for services for his attorneys, and expenses for running the business, and a certain sum for merchandise which he had purchased *and which he had not paid for.* The Circuit Court of Appeals for the Eighth Circuit held that Bramble, having acted in good faith, was entitled to be paid for all legitimate expenses and compensation, etc. The point was made that he had not paid the grocery company, but the court said:

> "The court will presume that he will pay the grocery company for the merchandise for which he owes it, upon his receipt of the money therefor, and it will be less expensive and more beneficial for the creditors of the estate to receive the adjudication of the rights of these parties and a disposition of this entire matter now than to leave it in a condition for continuing litigation upon a new claim presented by Bramble or by the Grocery Company."

Fairland v. Percy, 3 Probate & Divorce, p. 217, Ames' Cases on Trust, 2nd Ed., 423, is in point. The gist of the opinion is contained in the following quotation:

> "But the cases cited in argument show that where a testator by his will directs that his business may be carried on and that his per-

sonal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business, in addition to the personal responsibility of the individuals who give the orders for the goods or otherwise contract for the debt, are entitled in equity to claim against the estate of the testator to the extent that he authorized it to be used in the business."

In the same edition of Ames' Cases on Trust, Professor Ames has a note at page 432 as follows:

> "A trustee may stipulate by apt words that he shall not be liable personally, but only out of the trust moneys. In such a case the promisee cannot charge the trustee *de bonis propriis.* But he may reach the trust funds if the circumstances were such as to justify the trustee in pledging them for the benefit of the trust. Muir v. Glasgow Bank, 4 App. Cas. 337, 361, 365, 368, 369-70, 377, 386, 388; Campbell v. Gordon (Ct. of Sess, 1840), 2 D. 639; Johnson v. Leman, 30 Ill. App., 370; Glenn v. Allison, 58 Md. 527; Noyes v. Blakeman, 6 N. Y. 567; New v. Nicholl, 73 N. Y. 127; Perry v. Board, 102 N. Y. 99; Van Slyke v. Buch, 123 N. Y. 47; Stanton v. King, 8 Hun, 4; Fowler v. Mut. Co., 28 Hun, 195; Randall v. Dusenbury, 39 N. Y. Sup'r Ct. 174."

In O'Brien v. Jackson, 167 N. Y. 31, 60 N. E. 238, the court states the rule that an action cannot ordinarily be maintained by the creditor of an executor against him as executor, giving as one of the reasons therefor:

> "In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard."

This, of course, does not apply where the proceeding is in bankruptcy, as all the parties are parties to the proceeding and do have an opportunity to be heard, and did have such opportunity and were heard in the instant case.

The court in the New York case states the exception as follows:

> "To the general rule there are exceptions, and an equitable action can be maintained against the estate on behalf of a creditor in case of the fraud or insolvency of the executor or when he is authorized to make an expenditure for the protection of the trust estate and he has no trust funds for the purpose. In the latter case, if unwilling to make himself personally liable, he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose."

In connection with that opinion, as well as the note of Professor Ames, we beg to remind the court that the notes in question were endorsed without recourse, showing that "it was unwilling to make itself personally liable," and furthermore, the trustee, although noti nsolvent, was without sufficient assets to pay the claim.

Much of the foregoing discussion is academic, as both the trust company and the bank are petitioners herein and the proceedings are consolidated and tried together and they both ask for the same relief,—that is, that the claim be allowed in the name of the trust company.

We have no doubt that the trust company itself, without the presence of the bank, would have the right to file this claim, and although it may seem unnecessary to discuss the question, we will cite a few authorities to the point.

That the holder of a promissory note may maintain an action thereon, even though he does not in fact own the same, has been decided by the Supreme Court of Idaho in Craig v. Palo Alto Stock Farm, 16 Idaho 701, and in Home Land Co v. Osborne, 19 Idaho 95.

In the cause entitled, In re Halsey Electric Generator Co., 163 Fed. 118, the court said:

> "It also appears that Murray and Van Slyck each hold an assigned claim, that neither of them has any financial interest in the claim held by him, and that each of them holds his claim solely for the benefit of his assignor. This fact does not, however, disqualify either of them as a petitioning creditor. The assignments were made by persons who originally claimed to be separate creditors of the alleged bankrupt for the respective amounts of the claims assigned. Murray and Van Slyck are trustees for their respective assignors, and, as they hold the legal title to the claims assigned, they are the owners of those claims, and, if they be valid claims, are creditors."

In Ohio Valley Bank v. Mack, 163 Fed. 155 (a bankruptcy case), an objection was made to a claim evidenced by a promissory note on the ground that the note belonged to a certain bank instead of the claimant. The court said:

> "Whether Stockhoff owns the debt in his own right or as trustee for the bank, he is entitled to prove it, for it stands as a debt and mortgage to him, and his relation as trustee for the bank is of no significance as an objection to the allowance of the claim."

Bramble v. Brett, 230 Fed. 385, has been cited above. That case holds that Bramble, the trustee, under an assignment for the benefit of creditors, could after the estate was placed in bankruptcy in the Federal Court file a claim for expenses and services even for a debt owed by him to a grocery company which had not been paid.

In Kent v. Dana, 100 Fed. 56, the third head note is:

> "A holder of negotiable municipal bonds transferable by delivery may maintain an action thereon in his own name although they were transferred to him by the former holder for that express purpose, and he is accountable to such former owner for the proceeds, and such right is not affected by a State statute requiring suits to be brought by the real party in interest, since he is vested with the legal title. In such case the fact may be shown for the purpose of permitting any defense which might have been made against the former holder, but beyond that, the defendant has no interest in the equities which may exist between the transferror and transferee."

In Salmon v. Rural Independent School District, 125 Fed. 235, 241, the court said:

> "The fact, therefore, that the plaintiff in this case is the agent of the beneficial owner, does not prohibit bringing the action in his

> name, and the delivery to him of the possession of the bonds, which in effect are payable to bearer, with the authority to enforce the collection thereof, clothes him with sufficient title to maintain action in his own name."

That case cites O'Brien v. Smith, 66 U. S. 99. The second head note is:

> "The holder of the check, being the cashier of an unincorporated banking association, and holding it for the use of the concern, may recover upon it in his own name."

The entire opinion in that case is in the following language:

> "We think the decision of the Circuit Court was right upon both of the points raised in the argument. The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider are too well settled to be now open to serious controversy."

We submit that it is clear from the authorities and the evidence that:

(a) Either the trustee or the bank is a proper party to file this claim, and inasmuch as both of them are in court in this proceeding and there is no controversy as between themselves, the question as to the better practice is purely an academic one and not of the slightest importance herein.

(b) The intention of the trust deed is that all advances and other expenses shall be a first charge against both the trust estate and the interest or dividends of the signing creditors.

(See trust deed, paragraphs 1, 2, 8, 9, 10, 11, 14, 18 and 19.)

(c) It was the intention of the trust deed that the trustee should not be personally liable. (Paragraphs 8, 9 and 15, trust deed.)

(d) It was immaterial either to the bankrupt or the signing creditors who advanced the moneys. The signing creditors knew that the trustee had no moneys of its own to advance and that the bank did have an would make the advancements and would make same in reliance upon the trust deed, and knew this before any advancements were made. It was not the intention of the signing creditors or the trust deed that the trust should fail because the trustee did not itself have the moneys to make the advancements, but that the trust should be carried out, and in order to carry it out, it was necessary that the moneys for advancement be obtained from some bank.

(e) It was not the intention of the bank to hold the trustee personally liable, but to have a charge upon the trust fund and the interests of the signing creditors, as is also shown by the notes, originals and renewals, all of which were endorsed by the trust company without recourse.

(f) A bankruptcy court has the broadest equitable powers, even broader than the ordi-

nary court of chancery. To contend that the trust company could have no lien because it borrowed the moneys advanced, and to contend that the bank could have no lien because the trust company did not make itself personally liable, is neither equitable nor honest. Every one connected with the transaction knew that the money was being advanced under the belief and understanding that a lien was being created both upon the trust fund and upon the interests of the signing creditors for the amount of such advancement, and that otherwise it would not have been advanced.

(g) Whether or not a part of the moneys was actually advanced before the trust deed was actually executed by the bankrupt is immaterial. None of the moneys were advanced until after the instrument had been signed by all the creditors who did sign the same, and the whole transaction was ratified and approved at a meeting of the board of trustees and stockholders of the bankrupt on February 18th. Neither the bankrupt nor the signing creditors can contend that it was not advanced on the strength of the trust deed. No one contends to the contrary, and the correspondence mentioned above shows the fact. Other correspondence also shows that such was the original understanding. (See letters between Mr. Coman, Mr. Aaron and Mr. Stack, Exhibits 37, 38, 40, 41, 42, 43, 44, 34, 46, 47 and 48.)

Anyway, the bankrupt and the signing creditors have received the benefit of the money advanced at their instance and request, and upon the strength of their signing this instrument, cannot repudiate the same.

In this connection we beg to quote the language of Judge Dietrich:

> "From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets but its credit was exhausted, and that it was doubtful whether it could meet its next payroll. The parties who are now objecting to the recognition of the trustee's claim were large creditors whose interests were likely to be prejudiced in case of receivership or bankruptcy proceedings. They were desirous that the debtor should continue to appear to be a solvent going concern, hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. * * * * What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good

> morals. * * * * Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000 or any considerable portion thereof without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advantage, acted under the provisions of the agreement, be heard to say that it never went into effect. * * * * ''

BAD FAITH.

Pages 95 to 116 of appellants' brief are devoted to an argument that both the trustee and the bank acted in bad faith and therefore they are not entitled to recover this $100,000. Appellants indulge in many adjectives and some strong language, and this is quite natural, as the record shows beyond question that Judge Dietrich is right in his suggestion in the opinion that the present conduct of

these appellants does not accord with common honesty and fair dealing.

We have hereinbefore pointed out that neither in the formal writen objections to the petition of the trust company nor in the formal verified answer to the petition of the bank is there any charge of bad faith whatever.

If we correctly understand this argument, the charges of bad faith may be particularized as follows:

(a) The trustee did not take possession.

(b) $40,000 was loaned before Mr. Katz arrived.

(c) The bank paid itself a nine thousand-dollar over-draft out of the $100,000.

(d) The trust deed was not signed by the bankrupt until February 28th.

(e) The trustee did not conduct the business as provided in the trust deed.

(f) The business was operated at a loss.

This question of possession is quite fully discussed by Judge Dietrich as follows:

> "As to the question whether or not the trustee ever took actual possession of the property as directed by the trust agreement, I find upon examination of the record that just such possession was taken as was doubtless contemplated by the parties. In one aspect it is true the possession was colorable more than real, and my first impression was that the trustee had treated its obligations in this respect flip-

pantly, if not in bad faith, but when I come to analyze the record I find that it was clearly the intention of the parties signing the agreement that as little notoriety as possible be given to the transaction, and that therefore it was desired by all that the trust deed be withheld from the records until an emergency should arise making it necessary to record it, and that in so far as practicable the trustee should keep itself in the background. Any doubt which might otherwise exist is dispelled by the 'side agreement' or direction to the trustee, dated February 1, 1916, and introduced as Exhibit 39. Section 21 of the agreement itself provides that the agreement should not become effective until one Sigmund Katz, of Chicago, should be elected secretary and treasurer and a director of the debtor. But it should not be seriously suggested that anyone ever intended that Katz was to represent the interests of the debtor. He was undoubtedly there for the purpose of representing the creditors, and especially these objecting creditors, for it is provided that 'said Katz, or any other person that the majority in amount of the creditors of the lumber company (the debtor) who shall sign the within instrument, shall name, shall be elected and retained as such director and officer of such lumber company * * *, until the trust created by the within instrument shall be terminated.' It is very plain that the desire was that to the public at large the debtor should have the appearance of carrying on the business, and that, as stated in the 'side agreement,' as little publicity as possible should be given to the fact that its property had passed into the control of a trustee. Katz, being a member of the board of directors, and being the secretary and treasurer of the company, could guard against any precipitate action attempted by the debtor, until the trustee could be notified and could

> record the agreement and assert its exclusive right of control under the terms thereof. Katz was to be in the active management of the property, and while thus having his hand upon the throttle of the machinery of the debtor corporation he formally acknowledged himself to be the agent and representative of the trustee. It is futile now to say that the trustee violated its obligations to the creditors because it kept from the general public knowledge of its relations to the property, and of Katz's relation to it. It was undoubtedly doing precisely what the creditors wanted it to do in this respect." (Rec. pp. 85-86.)

Sigmund Katz was selected by H. J. Aaron, attorney and agent for Merrill, Cox & Company and Fort Dearborn National Bank. Katz was unknown to Mr. Gibbs or Mr. Coman or any of the other creditors. Aaron vouched for him as a man of lumber experience and ability and as the right man to come to Idaho to manage the business. Section 21 of the trust deed expressly provides that Sigmund Katz must be elected a director and secretary and treasurer of the bankrupt. Exhibit 39, dated February 1st, was signed by these large creditors and provides that the trust deed shall not be put of record and that as little notoriety be given to the same as possible. If the trust company had taken formal possession, ousted Gibbs and done business in its name, the matter would have become public and the object of these creditors nullified. So Aaron conceived the idea (and this trust deed was drawn by Aaron) that his friend, Katz, should be

the agent of the trust company and run the business, but that agency should be concealed from the public; he would be a director and sign papers as secretary and treasurer; he would be in absolute control without the knowledge by the public of the trust deed, but the purpose thereof would be carried out. It was arranged at the bank that no money could be drawn without the signature of Katz. (Rec. p. 229.) Katz came to Spokane with a letter of introduction from the vice-president of the Fort Dearborn National Bank to Mr. Coman and with instructions to see Mr. Coman and get his orders from him. He did this, then went to Gibbs, Idaho, and continuously thereafter ran the business until Merrill, Cox & Co. and the Chicago bank filed a petition in bankruptcy. In March the attorney for the trust company thought there should be something in writing in relation to this matter, and Mr. Katz got from the president of the bankrupt a letter acknowledging the fact that Katz was the agent of the trust company. (Rec. p. 225-9, 170-1.) When the stockholders' meeting of the bankrupt was held ratifying the trust deed, the fact of Katz being the agent of the trust company was also discussed with Katz. (Rec. p. 258, 167.) On February 19th Katz wrote a letter to the trust company, saying:

> "In reply to your request for our daily bank report, will say that we are preparing to send out such reports to every bank interested. The first reports will go forward in a few days." (Exhibit 13, Rec. 159.)

On March 31st a letter to the trust company signed by Gibbs and Katz, giving a list of the assets of the company, begins with these words:

> "I hereby wish to give you a list of the assets which we turned over to you on February 1st as trustee for our company." (Exhibit 20, Rec. 171.)

Katz sent a daily statement to the trust company. (Rec. 172.)

Whether this is or is not possession, it is unnecessary to discuss. It is the possession desired by the large creditors who signed the trust deed and the letter of instructions. The trustee did exactly what the large creditors wanted it to do, and they are clearly estopped from denying liability on account thereof.

This point was sustained by the court in In re Creech Bros. Lumber Co., 240 Fed. 8.

In this connection it is interesting to note who is making this particular objection. The following signing creditors are not, as they are not appellants:

Creditors	*Amount of Claim*
Fort Dearborn National Bank	$107,000.00
J. K. Stack	110,000.00
Idaho Timber Company	60,000.00
First National Bank of Lincoln	12,500.00
Shoshone Lumber Company	5,000.00
Exchange National Bank	6,000.00
S. H. Hess	30,000.00

Mrs. Tolerton	20.465.56
Total	$350,965.56

(Rec. pp. 57-8.)

The appellants are:

	Amount of Claim
Merrill, Cox & Company	$221,250.00
I. F. Searle	55,000.00
Mrs. C. D. Gibbs	12,725.00
Total	$288,975.00

So it is apparent, of course, that this is really the appeal of Merrill, Cox & Company and that Mrs. Gibbs and Mr. Searle are simply passengers. That is demonstrated by the brief itself.

H. J. Aaron, the attorney for Merrill, Cox & Company, drew the trust deed, selected Katz, instructed Coman what to do, and everything that has been done is either in accordance with his instructions first given or with his knowledge, approval and consent.

We find italicized on pages 111 and 112, appellants' brief, the statement that before Mr. Katz had arrived in Spokane, $40,000 of the money had been advanced and that on February 16th, 1916, $20,000 additional were loaned to the Stack-Gibbs Company and that the deed was not executed by the bankrupt until February 28th, and that counsel could demonstrate that these facts would

at least reduce the claim of the appellees to $40,000, and would do so except that it would make the brief too long.

That quick action was necessary was understood by all the parties, hence these telegrams of Mr. Aaron in the early part of February. "Creditors were pressing for payment of claims, labor was unpaid, loggers were demanding settlement for their accounts, and it seemed as though there was danger of the company being forced into the hands of a receiver. In fact, there were rumors that application for a receiver might be made." (Rec. p. 221.)

On February 9th, Mr. Coman, after receiving a telegram from Mr. Aaron that the trust deed had been signed by Mrs. Tolerton, wrote Mr. Aaron that advances would be made "in anticipation of the arrival of the contracts." (Rec. p. 223.) Aaron answered this letter and did not object to that statement. (Rec. p. 224.) Mr. Gibbs, the president of the bankrupt, concurred therein. (Rec. pp. 223-224.) Mr. Coman testified (Rec. p. 228):

> "As soon as the Mechanics Loan & Trust Company received a telegram from Mr. Aaron, they commenced advancing money. I refer to the telegram saying that the document was completed, the trust agreement. Nor did we stop because of the ambiguity here set forth in the letter. I had no doubt about the creditors and everybody agreeing to it because that was in accordance with our understanding."

When Katz arrived, $20,000 more was advanced. What was done with the $60,000 is set forth in a letter to the bank dated February 22, 1916 (Exhibit 10, Rec. pp. 149-151.) Mr. Katz sent this letter to the trust company, Merrill, Cox & Company, Fort Dearborn National Bank and Exchange National Bank. (Rec. p. 150.) The letter states that they have received $60,000 and that out of the business they have taken in $8,500. The letter states how the $68,500 was expended. The items of payroll, log contracts and freight on logs alone amount to over $40,000.

While at the trial the appellants and their associates as objectors sought to compel us to prove how this $100,000 was spent, and we did so prove, and also proved that it was all spent legitimately and in accordance with the letter and spirit of the trust deed, they do not now contend that the said $100,000 was not used for the purposes mentioned in the trust deed and in accordance with the letter and spirit thereof, except that they now, for the first time, contend that $9,000 thereof was used to pay an *overdraft* of the Exchange National Bank, which contention is false, as will be later demonstrated.

Whatever was done in respect to these advancements was known to the bankrupt and ratified by it at the stockholders' meeting and directors' meeting of February 18th authorizing the execution of the trust deed. It was known to the agent sent here

by these signing creditors,—and especially by Merrill, Cox & Company,—Mr. Sigmund Katz, who arrived in Spokane on the 15th or 16th of February. It was known to H. J. Aaron, the attorney for Merrill, Cox & Company and the Fort Dearborn National Bank, and acting for all of the signing creditors. At least it is apparent they relied upon Mr. Aaron to close up the transaction and look after their interests. The advancement was beneficial to the estate and to these signing creditors. An emergency existed, and Mr. Coman and the trust company acted in the best of faith in the matter. As said by Judge Dietrich in relation to another question:

> "Mr. Aaron, acting as attorney for some of the largest creditors, doubtless had such an understanding and expected the trustee to act upon it, *for in any other view, his conduct would seem to be quite indefensible from the standpoint of honor and good morals.*"

The conduct of Merrill, Cox & Company and their two passengers, Searle and Mrs. Gibbs, is indefensible from the standpoint of either honor or good morals.

Judge Dietrich further said:

> "No one now suggests that the trustee would have advanced $100,000 or any considerable portion thereof without the belief upon its part that it was protected by the provisions of the trust agreement. The advance, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having

> good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the agreement primarily to protect the debtor but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has to its injury and to their advantage acted under the provisions of the agreement, be heard to says that it never went into effect."

Appellants do not undertake to bolster up their present inequitable position by any authorities, nor could they, for none exist.

The reason for the delay of the bankrupt in signing the trust deed until February 28th, the same having been ratified and approved at a meeting of the stockholders and directors on February 18th, does not appear in the printed record, because the matter is wholly immaterial. It does appear, however, in the record, that when Mr. Coman came back to Spokane his local attorney pointed out an ambiguity in paragraph 20 of the trust deed, and that there was some correspondence with the creditors to clear up same, and that was done without any misunderstanding in relation thereto. (Rec. p. 174-5.)

We now reach the point made by appellants that the Exchange National Bank held a nine thousand-dollar overdraft against the bankrupt and the same was paid out of this $100,000. While immaterial, it is not true. Judge Dietrich says in his decision (Rec. p 82):

> "It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane only $6,000."

The Exchange National Bank signed this trust deed as a creditor for $6,000.

This matter is not alleged directly or inferentially in the answer to the bank's petition nor in the objections to the trust company's petition. This point was not conteded for upon the hearing. During the trial the objectors seemed to think they had made a discovery on account of certain notes, one for $10,000 and one for $15,000, which were made in December, 1915, and which were cancelled by the bank the latter part of January, 1916, and before Mr. Coman went to Minneapolis. They stirred up some dust in relation to these notes and contended during the trial before the Referee that these notes were paid out of this $100,000. In the process of introducing evidence in relation to these notes some evidence was introduced on the subject of overdrafts, but the point was not made upon the hearing or elsewhere that there was in fact an overdraft in the bank on February 1st, and that it was paid out of the moneys in question. The books of the bank in respect to the bankrupt's account for January and February were in court and Mr. Adams cross-examined Mr. Coman in relation thereto, and while other dates were used by Mr. Adams in cross-examination as to said account, he did not ask Mr. Coman as to February 1, 1916. Neither did we,

because the question of overdraft on that date, whether it existed or did not exist, was not mooted or suggested either by answer, objections or suggestion or argument during the hearing. However, there is evidence in the record showing beyond the possibility of a doubt that there was no overdraft on that date, and no such overdraft was paid out of such moneys, and the two notes in question were not paid out of said moneys either in whole or in part.

The objectors put in evidence an exhibit to show the indebtedness of the bankrupt on February 1, 1916. (Rec. pp. 291-296.) There were two banks by the name of the Exchange National Bank, one in Spokane and the other in Coeur d'Alene. In this exhibit Mr. Katz has an item for overdrafts and has an overdraft against the Exchange National Bank of Coeur d'Alene (Rec. 294) (which, by the way, did not exist, in fact, as was found by Judge Dietrich—Rec. p. 82). As to the Exchange National Bank of Spokane, the only item of indebtedness to that bank is under the head of notes, and the item is $21,000. (Rec. p. 292.)

On cross-examination Mr. Katz testified:

> "The next item, the Exchange National Bank, $21,000, that item is made up of the $6,000 they signed for on the trust deed and the $15,000 notes that Mr. Coman and I have both testified that were marked cancelled some time or another."

We will first note the evidence in relation to these notes and then take up the evidence in relation to the overdrafts. Mr. Coman presented the original books of the bank and testified with those before him as follows: On December 30, 1915, C. D. Gibbs, as maker, gave a note for $5,000, which was also signed or endorsed by Stack-Gibbs Lumber Company. A certificate of deposit for that amount was issued but retained by the bank because that note was to be secured by an acceptance on a lumber company in Denver. The security never came, and on January 25, 1916, before Mr. Coman started for Minneapolis, that certificate of deposit and that note were cancelled. The bankrupt never got any credit on any book of the bank for said $5,000 and neither the bankrupt nor Gibbs ever used the same. (Rec. pp. 236-7.)

As to the ten thousand-dollar note on December 30, 1915, such a note signed by C. D. Gibbs and signed or endorsed by Stack-Gibbs Lumber Company was made out. The amount of that note was credited in the Stack-Gibbs Lumber Company account No. 2, which was a balance account.

Mr. Coman testified:

> "No checks or drafts could be drawn on that account except countersigned by me. That was for a special purpose. They never used the money. They had no right to use it, and it was never drawn from the bank." (Rec. p. 238.)

On January 25, 1916, that note was cancelled,

which was before Coman left for Minneapolis. (Rec. pp. 236, 239.) No money was used to pay either note.

On February 12th the bankrupt, per Cleland, wrote a letter to the bank enclosing a check for $153.33 as interest for forty days on these two notes, saying:

> "If this meets with your approval, kindly *cancel* the notes and return same to us."

That matter was attended to by the teller of the bank. (Rec. p. 255.) Mr. Coman told the creditors in Minneapolis about this transaction. (Rec. p. 231.) There is no controversy over the transaction being just as shown by the bank books. The bankrupt's books show that the notes were cancelled, the entry being under date of February 15th. (Rec. p. 215.) Katz admitted that no check was ever given to pay these notes or any part thereof except that check for interest. (Rec. p. 232.) The bank, of course, is bound by its statement in the trust deed that the indebtedness of the bankrupt to the bank on February 1st was $6,000, and that in truth was all it was.

Now as to the evidence in re overdrafts: At one stage of the proceedings Mr. Katz got enthusiastic on behalf of his Chicago friends and testified as quoted in appellants' brief. He was testifying *from the books of the bankrupt*, not made by him but by somebody else, and drawing certain inferences from those books. It is conceded that the

bankrupt's books might show a bank account overdrawn when in fact it was not overdrawn, because the checks had not been presented at the bank and a deposit was made before the checks were presented. "The books of the Exchange National Bank and the books of the Stack-Gibbs Lumber Company would never agree." (Rec. p. 229.) This was well illustrated by the state of the books on January 1, 1916, the bank books showing that the bankrupt had a balance of $202.25, while the bankrupt's books showed a balance of $28,195.77. (Rec. p. 230.) Katz conceded there was no overdraft on February 1, 1916. Some evidence on the subject of overdrafts was introduced because of the statement, "bank overdrafts, $12,000," in the letter issued February 22nd. (Rec. p. 151.) It appears from that letter that $60,000 of the $100,000 had been drawn and that $8,500 had been received from shipments of lumber, and that the $68,500 had been paid out, and the letter purports to state how the money was paid. One item was the item above quoted. The business of the bankrupt had been carried on continuously from February 1st to February 22nd and thereafter, and a bank that showed a credit balance on February 1st might show an overdraft on the 2nd or the 10th or the 20th, or any other day, and of course it was proper to use these trust moneys for any legitimate purpose of the business after February 1st. Mr. Katz, in attempting to figure out what was this twelve thousand-dollar item, testified (Rec. p. 154) that on

February 11th the Exchange National Bank of Coeur d'Alene, Idaho, had an overdraft of about $6,000; that on February 14th the Fort Dearborn National Bank had an overdraft of about $22,000, and then he undertakes to explain that the latter was not really an overdraft; that on February 15th the Exchange National Bank of Spokane had an overdraft of $8,000; on February 16th the Fort Dearborn National Bank showed an overdraft of $22,000. and the Exchange National Bank of Spokane, $10,000, and that $5,000 had been paid on the overdraft at the Coeur d'Alene bank. On the 17th the Fort Dearborn National Bank was overdrawn $10,000, and the Exchange National Bank of Spokane $13,000, and the Coeur d'Alene bank $1,000. On February 19th the Fort Dearborn National Bank, according to his books, showed an overdraft of $5,000, the Exchange National Bank of Spokane $5,000, and the Coeur d'Alene bank $1,000, and on the 21st the books showed the Fort Dearborn National Bank was overdrawn $5,000, and the Exchange Bank of Spokane $6,000. (Rec. p. 155.) And then he draws the conclusion that that letter which stated the twelve thousand-dollars overdraft item must have met the following payments on account of overdraft: Coeur d'Alene bank, $6,000; Spokane bank, $4,000; and the remainder was to the First National Bank of Lincoln, Nebraska. (Rec. p. 156.)

At a later time (Rec. pp. 180-181) Katz testified

he had gone over the figures again and discovered that the total disbursements in the letter of February 22nd should be $76,000 instead of $68,500, and at that time there were auditors here from Chicago (evidently sent out by the two large Chicago creditors).

Mr. Katz does not testify that on the 1st day of February, even according to the books of the Stack-Gibbs Lumber Company, in which there had been wrongully placed a charge against the Exchange National Bank for $15,000, subtracting that $15,000, there would be an overdraft of $9,000 on February 1st, but he testified (Rec. p. 209) that on the last day of January, according to the books of the bankrupt, the bank balance in the Exchange National Bank of Spokane was $10,074.11. Mr. Adams did not ask him as to the situation on February 1st, but at once jumped in the next question to February 14th, and it is on February 14th that he gets the overdraft of $9,000 according to the bankrupt's books, not on February 1st. (Rec. pp. 209-210.)

Finally the objectors themselves proved that there was no overdraft. Katz was their only witness. Through him they introduced (over our objection) a statement purporting to show assets and liabilities, and in that statement we find (Rec. pp. 302-303) that *on February* 1, 1916, *the deposit in the Exchange National Bank of Spokane was* $15,431.09, according to the books of the bankrupt.

This apparently included the false entry of $15,000. But there was a credit and not an overdraft, and the bank books would necessarily show a larger credit because there would be checks in transit. (Rec. p. 230.)

When Mr. Coman was in court with the books of the bank showing the entire account of the Stack-Gibbs Lumber Company, and Mr. Adams was cross-examining him, he could have introduced the evidence from those books that there was an overdraft according to the books of the bank if such had been the fact. He did not introduce any evidence as to that date, because such was not the fact, but he did call out the fact that during December, 1915, the bankrupt had an average balance of about $4,000, and on January 11, 1916, it was $8,000. (Rec. p. 246.) He again cross-examined Mr. Coman in relation to this matter (Rec. p. 257) and drew out of him the fact that there was an overdraft on December 15th and on December 21st. The overdraft on December 15th was large, but the next day there was a balance—"evidently a remittance in the mail to cover that."

We did not ask Mr. Coman as to the condition of the bank books on February 1st, because there was no intimation or suggestion that the question of overdraft on that day would have existed or did not exist and had aught to do with this case. It was not pleaded in the answer or the objections. It was not suggested upon the hearing. The whole

controversy at this time was over the suggestion made by counsel that there was something wrong in relation to these two notes, one for $5,000 and one for $10,000. That, they have now abandoned and are injecting another false issue into the record.

This charge is not against the trust company, but against the bank. In the answer to the bank's petition they admit that the bank advanced $100,-000 and that it was used by the bankrupt, and their sole defense as stated in the answer is that the bank was not a party to the trust agreement and cannot take advantage of its terms. There is no charge of bad faith or impropriety or anything of that kind.

It appears that there were some overdrafts in February in the First National Bank of Lincoln, the Fort Dearborn National Bank of Chicago and the Exchange National Bank of Coeur d'Alene, and that those overdrafts, by some process or other, were reduced. It is not contended that the payment of any of these overdrafts would be in violation of the terms of the trust, or bad faith. Why any special privileges or preferences toward the other banks? Two of the other banks, the Chicago bank and the Lincoln bank, are signing creditors to the trust agreement and are among the original objectors, but are not now appellants.

Furthermore, Mr. Coman testified that he told the creditors at Minneapolis about the situation as

far as his bank was concerned, and there is no charge whatever that he made any sort of misrepresentation. Not one of these signing creditors, either in person or by agent or representative, has given any testimony in this matter.

Before taking up the next specific charge of bad faith in the brief, we will call attention to a few of the many misstatements of fact contained therein in reference to the subject last discussed.

It is said therein on page 97 that the balance note was for a larger sum than the loan made to the bankrupt. This is not true and there is no such evidence. On the contrary, Mr. Coman testified (Rec. p. 246):

> "The rule of the eastern banks that I have been dealing with is that the balance should be 20% of the amount of the loan. We are just getting to the point that we are introducing these eastern customs into our banking practice in Spokane and we haven't got up to as high as that percentage. In 1915 there was no fixed rule. Sometimes we banked as high as 20%, sometimes as low as 5%."

The misstatements on that and subsequent pages in respect to the two notes referred to have been above pointed out.

The statement on page 98, brief, that a part of the $6,000 loan was secured by real estate is not in the record at the place named. We are aware of no such evidence.

As to the period of the interest item, we have commented upon it above.

The general statement that the bank was charging usurious interest has no foundation in fact, but if it did, that would not afford any defense herein or any excuse for the attempted repudiation of these appellants. Judge Dietrich said in relation thereto:

> "Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegitimate or immoral, it still remains true that $6,000 was the actual maximum indebtedness, and that is the only fact with which we are here concerned." (Rec. p. 82.)

The statement on page 100 that Mr. Coman was "principal owner" of the trust company is simply one of the hallucinations of counsel. There is no such evidence.

The comments on Mr. Coman's testimony on pages 100 and 101, brief, need no comment, as we have cited this court to the record showing his testimony.

Why they should say at the bottom of page 101 that Mr. Gibbs and Mr. Coman had with them a trust deed drawn by Mr. Post, we know not. Anyway, Mr. Post is not the author of the instrument that was signed. That was prepared by Mr. H. J. Aaron, a Chicago lawyer and attorney for Merrill, Cox & Company. (Rec. p. 216.)

The statement on page 102 that Mr. Gibbs represented at Minneapolis, with the consent and acquiescence of Mr. Coman, that the Stack-

Gibbs Lumber Company was in splendid financial condition and that its assets largely exceeded its liabilities, and that with leniency, etc., has no support in the evidence. Mr. Gibbs had with him a statement of the assets and liabilities prepared by him, but that statement is not in evidence. What Gibbs said is not in evidence. No one of these creditors has testified in this case. It is not contended by the evidence that Mr. Coman knew anything more about this company than the other creditors knew about it.

Immediately after the execution of the trust deed, an auditor was sent from Chicago to examine the books of the bankrupt. It is self-evident that Merrill, Cox & Company, note brokers, and the Fort Dearborn National Bank of Chicago would not loan the Stack-Gibbs Lumber Company $338,-000 without having an audit of their books and some examination of their property. Such a transaction does not accord with ordinary business prudence. On the other hand, the Exchange National Bank of Spokane had a loan of only $6,000.

The statement on page 102 that it was asserted to the creditors that $50,000 would be sufficient money to save the corporation is incorrect. It will be noted that counsel do not say who "asserted." The testimony shows that they talked about $50,000 in Minneapolis and that Mr. Fletcher of Fort Dearborn Bank stated that he had had large experience in transactions of this kind

and he thought it better to make it $100,000. (Rec. pp. 278-279.) It may be, as stated on pages 102 and 103, brief, that it was the duty of Mr. Coman to tell the creditors at Minneapolis all the facts within his knowledge, but there is no evidence that he failed to do that. There is nothing in the pleading or proofs on that subject. If Mr. Coman had thought that the Stack-Gibbs Company was really bankrupt and that the plan of financing would be a failure, it is manifest that he would not have advanced $100,000. Judge Dietrich clearly points out the absurdity of any such contention. Mr. Coman's confidence is also demonstrated by the fact that he agreed upon a rate of interest at 6%, although the usual banking rate was 8%.

The statement on page 103 "that his (Coman's) silence in the face of the false representations of C. D. Gibbs as to the condition of the Stack-Gibbs Company amounted to fraud on the balance of the creditors," like many others, is quite inexcusable. It is not only not contended in the pleadings that either the trust company or the bank or Mr. Coman was guilty of any fraud, but while they allege in their objections that false and fraudulent representations were made by C. D. Gibbs, Stack-Gibbs Lumber Company and the Dryad Lumber Company, the same being Objection No. 11 (Rec. p. 20), none of these objectors has had the decency to give any testimony and there is no testimony on that subject. Furthermore, there is no testimony that Mr. Coman had any knowledge or suspicion that

anything that Mr. Gibbs said was otherwise than truthful. The fact is that every one connected with this transaction had confidence in Mr. C. D. Gibbs. The whole record shows that.

Subdivision 3 on pages 112 and 113, brief, is devoted to a tirade against the trust company, consisting of the general statement that the trust company did not carry on the business and closing with the expression that counsel hazard the suggestion that their statement that the position of the trust company and the bank is inconsistent with good morals, good business and the fiduciary relationship of the trust company will go unanswered. It was answered by Judge Dietrich in his decision. The facts are plain and indisputable. These creditors conceived the idea that the trust company should keep in the background; that the trust should be kept a secret; that the deed should not be put of record; that their own man, Mr. Katz, should come out from Chicago and run the business. He was selected by Aaron, the attorney for the appellant, Merrill, Cox & Company. Katz came, and the instructions of these appellants and the other creditors were faithfully obeyed.

Subdivision 4, pages 113 and 114, brief, says the trustee did not collect any of the debts owing the bankrupt. That statement is untrue and there is no such evidence. There has never been any contention that any debt owing the bankrupt was lost through any failure on the part of the trust com-

pany. According to Mr. Katz's exhibit (Rec. p. 302), the bills receivable on February 1st amounted to less than $6,000. There is no evidence of any neglect in relation thereto. However, if their man, Katz, was neglectful in some regard, we are at a loss to understand the mental operations of any person who would think that the people who selected him and presented him to the trust company could, because of that fact, if it existed, repudiated their own debts or obligations to the trust company.

The point that the business was operated at a loss was a star point of the objectors during their introduction of evidence before the Referee, all introduced over our objection as immaterial and not within the issues made by the answer and objections. The size of even the printed record on the subject demonstrates this, but now it has been shoved into the background and there are only ten lines on the subject in appellants' brief, page 114. Apparently the absurdity of the contention has penetrated the consciousness of Merrill, Cox, Aaron, Katz & Company. We feel that we should not wholly ignore the insinuation in appellants' brief.

Merrill, Cox & Company and their passengers, Mrs. C. D. Gibbs and Mr. Searle, do not contend that Mr. Katz was lacking in capacity or competence to handle the business, nor that he acted dishonestly or lacked industry or attention. As he

was selected by them and put in charge at their instance, such an excuse for their attempted repudiation would not receive much favor. Katz himself testified that he knew of nothing that could be even characterized as mistaken judgment except that there might be possible criticism as to the building of a little logging road that would cost ten or twelve thousand dollars, and as to that, he acted according to the best information he could obtain and according to that information he could not be charged with even a mistake of judgment. (Rec. p. 335.)

The whole testimony on the subject of loss of money was received over our objections (Rec. 297). Later our motion to strike same (Rec. p. 355) should have been granted.

The Referee conceded that Exhibit No. 4 (Rec. p. 301-6) prepared by Mr. Katz was without much, if any, weight, but he would not strike same. (Rec. p. 357-8.) Katz's contention was that, as shown by said Exhibit No. 4, the bankrupt estate had been decreased between February 1st and July 29th by the sum of $43,812, but that the Dryad Lumber Company had made a profit during said time of $18,489. Appellants assert in their brief that the two companies should be treated as one as far as this appeal is concerned. (Appellants' Brief, pp. 9-10.) The difference between the two items is $25,325. So if there was a loss in the management of the trust and this evidence is to be accepted on

that subject, the last named figures are the amount of loss. The evidence, however, does not show loss. It is apparent that this exhibit was prepared to assist the witness' Chicago friends. That is conclusively demonstrated by the exhibit itself. See the item headed "Reduction in Assets between February 1, 1916, and July 29, 1916." (Rec. pp. 304-5.) You will note (Rec. p. 305) that these assets which were used up between those dates are put in at "market price." This is followed by a heading entitled "Addition to Assets Between February 1, 1916, and July 29, 1916, which assets were still on hand July 29, 1916." In Record, page 305 the first lot of items, the prices are "those of appraisers," not Mr. Katz's valuations but the appraisers' in the bankruptcy proceeding, and of course placed very low. Then turn to page 306 under the same heading; you will note that the first three items of logs are not valued as "market price" or market value, but on some other basis. Following is an item of lumber. The lumber item gives the footage for February 1st and the footage for July 29th, and they subtract those two items and then figure the differences on the basis of "average cost price" and not on the basis of value. In other words, Mr. Aaron's friend, Mr. Katz, figures the "reduction in assets" on the basis of market value, but the item, "addition to assets," on the basis of *cost* instead of market value. Not only that, but they had three different kinds of lumber,—white pine of various grades, the most

valuable, and western pine of various grades, and mixed timber of various grades. The value of the lumber on hand February 1st depends upon (a) the quantities of each character of lumber and (b) the grades of each character of lumber, and the same is true as to the value of the lumber on hand July 29th.

Between February 1st and July 29th the mill was being run and lumber was being manufactured and sold. To subtract the quantity on hand February 1st from the quantity on hand July 29th and figure that quantity at average cost price, is an arbitrary proceeding admittedly wholly inaccurate for the purpose of determining the value of the increase in assets. The 4,612,000 feet on hand February 1st may have been mostly fir and tamarack, and the lumber on hand July 29th, 5,864,000 feet, may have been mostly white pine of first quality. There is no evidence on the subject. Katz said (Rec. p. 351): "I cannot give you the proportion of white pine," referring to the lumber on hand February 1st, and (same page), "I do not know the market price of lumber at that time," and (same page), "White pine was worth more than western pine; I would think it was five or six dollars more a thousand than western pine, and western pine about two dollars a thousand more than mixed," and (Rec. p. 352), "I did not figure on the value of the lumber as of February 1, 1916;" also, "We never went into details as to how much of the lum-

ber was white pine or how much was yellow pine or how much was mixed."

"Q. You just took a running jump at it?

A. That was just about what we did.

Q. But in order to get at the average cost price, you have got to get at the quantity of each kind of lumber, haven't you?

A. Well, in order to figure out exactly what the lumber did cost, you have got to point out all those details you have just mentioned." (Rec. pp. 352-3.)

He admits that if 4,000,000 of it is white pine and 1,000,000 feet yellow pine, the average cost price figure would be different than if 3,000,000 feet was white pine and 2,000,000 feet yellow pine. (Rec. p. 353.) In other words, he admits that his average cost figure is incorrect even on that basis. He says that he cannot tell the *value* of lumber on hand July 29th. (Rec. p. 353.) He says (Rec. pp. 354-5):

"Q. But if when you compare, if you were trying to get at in making up the schedule, Exhibit 4, the difference in the market value of the lumber at Gibbs, Idaho, as it was on February 1. 1916, and the value of the lumber as it stood at Gibbs, Idaho, on July 29, 1916, you would get up an entirely different set of figures than you did in Exhibit 4?

A. Yes, I certainly would go at it differently.

Q. And if you were undertaking to get the market value of the lumber as it stood on these two different dates, you would have to have the quantities of white pine and other classes of lumber as of each date, wouldn't you?

A. Yes, sir.

Q. If it was less, if the quantity of white pine was less on February 1st than it was on July 29th. then it would not be fair, would it, Mr. Katz, to subtract the two items and then determine the value on the difference; you couldn't do it that way, could you?

A. As a matter of mathematical calculation, not very well unless you simply assumed an average.

Q. No, not an average. I say if the percentage as to white pine was different on February 1st than it was on July 29th, you couldn't do it this way by subtraction?

A. No, sir."

We then made a motion to strike this Exhibit No. 4. (Rec. pp. 355-6.) The Referee denied the motion but stated that the exhibit was entitled to but little weight. (Rec. pp. 357-8.)

It is evident that the exhibit as explained by Mr. Katz's testimony is entitled to no weight at all. It is also evident that appellants concede that. Otherwise there would be come real discussion of

the subject instead of ten lines on page 114. The position of Merrill, Cox & Company is this:

> "As large creditors of the Stack-Gibbs Company, we thought it best for ourselves that that company should make an assignment to a trust company and that the trust company should advance $100,000 to run the business at 6% interest, such advancement, together with other expenses, to be a first charge against the property and against our interest by way of dividends. For our own protection we selected the man to run the business. The trust company accepted our man and he ran the business. Our man was not guilty of any peculation or dishonesty or bad judgment, but the thing did not turn out as well as we hoped for and he actually made a loss of about $20,000. The money was advanced by the trust company and used to meet payrolls and pay small creditors and do other things as contemplated by the trust deed. The trust deed provides that the trust company shall not be liable for any losses. Nevertheless, we contend that because there was a small loss under the management of our man, the trust company shall lose the $100.000 it advanced."

Further comment is unnecessary.

NINETY PER CENT

The last contention made by appellants is that they can repudiate the contract, accept the benefits of the advancements made by the trust company and prevent either that company or the bank from having any lien, although all the advancements were made according to the understanding and agreement of the parties, because they say that

when figured out mathematically the debts represented by the signing creditors did not equal 90%.

It will be noted that the order of the Referee will stand and is final and conclusive as to each and every one of the signing creditors representing more than one-half in amount of said claims, because none of them are appellants herein, the only appellants being Merrill, Cox & Company, Mrs. Gibbs and Searle.

It will also be noted that the claims of Searle and Mrs. Gibbs amount to only $67,000, while the claim of Merrill, Cox & Company amounts to $221,000, and that H. J. Aaron had charge of this business for the latter and really for all of the signing creditors. What was done was either per his instructions or with his knewledge and acquiescence, as will be pointed out below.

We contend that according to the letter and spirit of the trust deed, 90% did in fact sign. We also contend that it is not material and that these appellants cannot raise the point for the reasons fully discussed hereinafter.

Judge Dietrich covered this question quite fully (Rec. p. 78):

> "The most serious question is whether the trust agreement was signed by a sufficient number of creditors to give it validity. The referee did not find that as a matter of fact the signatures aggregated ninety per cent of the total indebtedness, nor do I think that if we regard the instrument alone, apart from

the practical construction placed thereon by the parties in interest, it would be possible to make such a finding. While we might very reasonably exclude certain of the items embraced in the $871,853.27, which the petitioners here contend is the correct footing, we cannot consistently exclude enough to give the required ratio between the entire remaining indebtedness and that represented by the signatory creditors. But I am satisfied that all the parties acted upon the assumption that with the signature of Mrs. Tolerton the condition was fully complied with, and that the practical construction placed upon a writing at the time of and subsequently to its execution by the parties in interest may, and ordinarily should, be adopted by the court. From the record it is to be inferred that an emergency existed in the affairs of the debtor; that it had large assets, but that its credit was exhausted, and that it was doubtful whether it could meet its next payrolls. The parties who are now objecting to the recognition of the trustee's claim were large creditors, whose interests were likely to be prejudiced in case of a receivership or bankruptcy proceedings. They were desirous that the debtor should continue to appear to be a solvent, going concern; hence the plan outlined in the trust agreement. But the very object of this plan might be frustrated at any moment, and for that reason they were anxious to have the agreement go into effect as soon as possible. They discussed the signatures that could probably be obtained, and made provision for taking up and satisfying intractable claims up to a certain amount. So far as appears, the trustees and its allied interests were not deeply concerned. The actual indebtedness held by the Exchange National Bank of Spokane was only $6,000.00, and was relatively unimportant. I am wholly

at a loss to understand how the trustee could have had any strong motive of self-interest such as would induce it to assume a large risk in advancing the $100,000.00 authorized by the agreement. What consideration did it have for putting this sum into a tottering business enterprise, unless it believed that the trust agreement, by which alone it could have protection, was in effect? Surely there must have been a clear understanding upon the subject, or an experienced business man of large affairs, such as it seems Mr. Coman was, would not have done what, without such an understanding, would be utterly foolhardy. Mr. Aaron, acting as the attorney for some of the largest creditors, doubtless had such an understanding, and expected the trustee to act upon it, for in any other view his conduct would seem to be quite indefensible from the standing of either honor or good morals. I have no doubt that he understood that the condition had been fully complied with, and assumed that the trustee would have the protection afforded by the trust agreement. Surely under the circumstances it was not contemplated that the trustee was at its peril to determine for itself whether the requisite ninety per cent had signed. For example, there appear to have been some controverted claims and other claims not disclosed by the records of the debtor. Was it to wait until the disputed claims were litigated or otherwise adjusted, or until the statute of limitations had fully run, in order that it might be sure that there was no undisclosed indebtedness, before it could safely proceed to execute the trust? When we come to examine the agreement we find that its spirit is out of accord with such a view. In paragraph nine it is expressly provided that in the conduct and management of the trust estate the trustee should be reimbursed out of

the estate for any claim which might be asserted against it, for damage done to third persons, even though such damage might have been caused by the negligence or misconduct of the trustee's officers, agents and employes. And in the fifteenth paragraph it is provided that if the trustee exercised reasonable care in the selection of its agents and employes it should not be held liable for any loss or damages from their negligence or default. Doubtless the objecting creditors all knew that the trustee was acting upon the assumption that the trust agreement was in effect, and that the condition under consideration had been fully complied with. They must have known that it was making advances upon the strength of such assumption, and yet they kept silent. No one now suggests that the trustee would have advanced $100,000.00, or any considerable portion thereof, without the belief upon its part that it was protected by the provisions of the trust agreement. The advances, while perhaps not fully beneficial, were highly beneficial to the estate. I am not inclined to acquiesce in the view that, knowing or having good reason to believe that the trustee was proceeding upon the assumption that the trust agreement was in effect and that it was advancing moneys in furtherance of the object of the agreement, primarily to protect the debtor, but ultimately for the benefit of the creditors, these petitioners, after remaining silent so long, can now, after the trustee has, to its injury and to their advantage, acted under the provisions of the agreement, be heard to say that it never went into effect.

When in the light of the surrounding circumstances and the conduct of the parties we consider the several items relied upon by the petitioners as constituting part of the indebt-

edness, we find little difficulty in eliminating most of them. It is clear beyond the need of discussion, I think, that in fact there was due to the Exchange National Bank of Spokane, only $6,000.00. Even were it to be granted that the dealings between this bank and the debtor were usurious or otherwise illegal or immoral, it still remains true that $6,000.00 was the maximum actual indebtedness, and that is the only fact with which we are here concerned.

There was in truth no overdraft at the Exchange National Bank of Coeur d'Alene. While in a sense the floating checks upon this bank aggregating $15,431.07 represented indebtedness, they were issued in the expectation that current deposits would be sufficient to take care of them as they were presented. Such a species of indebtedness would naturally fluctuate from day to day, if not from hour to hour, and it is not to be assumed that the parties contemplated that it would be taken into account.

The debtor was under contract to deliver to divers persons lumber and logs to the aggregate value of $79,852.62. From one point of view, of course, these obligations are the equivalent of an indebtedness in the strict sense of the word, but the trust agreement itself bears strong internal evidence that such obligations were not intended to be taken into consideration as a part of the 'indebtedness.' Express reference is made to the largest of such contracts, one covering lumber of the value of $32,948.40, with a provision for its specific performance by the delivery of the lumber called for. So far as appears, the debtor was having no trouble in meeting obligations of this character. It had sufficient assets, but its embarrassment was due to its inability to realize money thereon. Apparently it was able to

> meet its obligations under these contracts—which required no payments in money—and was ready to do so.
>
> There is also an item of $19,500.00 of indebtedness due to one Yeomans, who held lumber as security. Apparently the parties intended to treat secured claims as being in a distinct class. For example, there were also obligations secured by a trust deed, but no one is contending that they should be considered in computing the indebtedness covered by the trust agreement; and yet in a very real sense, of course, they constitute indebtedness.
>
> Most difficult perhaps of all are the numerous items, disputed and undisputed, amounting to approximately $40,000.00, which did not appear upon the debtor's books, but, as already suggested, it is hardly reasonable to suppose that anyone thought that the trustee must, at its peril, find out whether the debtor owed unrecorded debts. It is quite incredible that anyone could have been found willing to accept the trust upon such terms."

As stated above, we contend that the amounts represented by the signing creditors in fact constituted 90% of the indebtedness of the bankrupt, as understood by the parties and as shown by the trust deed itself, without the benefit of any extraneous evidence.

The amount represented by the signing creditors is $639,940.56. (Rec. pp. 57-8.) Defendants Exhibit No. 3 (Rec. p. 295) places the total indebtedness as per books February 1st at $636,519.35. Mr. Katz omitted therefrom the conceded indebtedness of three of the signing creditors, to-wit, Mr. Searle,

Mr. Hess and Mr. Stack, of $195,000, which added makes a grand total of $831,519.35.

Mr. Katz also states in Exhibit No. 3 that there were liabilities in existence on February 1st *which were not on the books* amounting to $40,333.92, and testified that some of these liabilities were disputed items and subject to litigation and there was no way of obtaining knowledge of them until the bills were presented. (Rec. pp. 317-320.) Clearly they are immaterial so far as the present controversy is concerned.

Manifestly it was not the intention of the parties that if creditors representing 90% of the indebtedness *as per books* should sign this trust deed and moneys should be advanced and expenses incurred by the trustee, and it should subsequently turn out that there was some indebtedness not shown upon the books, which, if taken into consideration, would reduce the percentage blow 90, then the trust company would lose its expenses and advancements. It is presumed that these business people were acting intelligently and honestly with one another. It certainly was not the intention of the parties that Mr. Coman must find at his peril all indebtedness not shown on the books, in addition to that for which the creditors signed. Surely he was to take the figures put upon his trust deed by these creditors at their face value and the figures as shown upon the books at their face value. The contract is not to be construed so as to make a snare out of it.

As said by the Supreme Court of the United States in 94 U. S., p. 46, elsewhere cited in this brief:

> "Every intendment is to be made against the construction of a contract under which it would operate as a snare."

Clearly, in making our figures, we must discard the item of $40,333.92 (doubtful items, some in litigation), *none of which are shown on the books of the company* and none of which could be discovered speedily or discovered by an accountant at all from the books and papers. The whole record shows that an emergency existed and Mr. Coman was to act quickly and bring about an advancement of the money, and such was the desire of all of the objectors. That desire is put in writing by the appellants, Merrill, Cox & Company, per their attorney, H. J. Aaron.

The other item, total of liabilities on books, as placed by Mr. Katz, $636,519.35, contains many errors which we will first consider. There are two patent errors: (a) He has put down Exchange National Bank of Spokane as a creditor for $21,000 instead of $6,000; and (b) he has put down the Exchange National Bank of Coeur d'Alene as having an overdraft of $15,431.09. He admits that in order to make the Exchange National Bank item $21,000, he adds to the $6,000 for which the bank signed the trust deed the two notes, one for $5,000 signed by C. D. Gibbs, and one for $10,000 signed

by C. D. Gibbs and the lumber company, concerning which considerable evidence was introduced and which has been commented upon above in this brief. The Stack-Gibbs Lumber Company never got the cash on these notes, never got any credit on the books of the bank on these notes, and these notes were cancelled without being paid by check or in any other manner on January 25, 1916. There is no controversy over that. Furthermore, when the bank signed the trust deed on February 1st for $6,000 and no more, it agreed with the other signing creditors that that was the total amount of its claim against the lumber company which should or could be taken into consideration in determining this 90%. It is clear, therefore, that that item of $15,000 should be subtracted from Mr. Katz's figures.

As to the alleged overdraft of $15,431.09 at the Exchange National Bank of Coeur d'Alene, it is beyond dispute that such item cannot be taken into consideration, and for many reasons: In the first place, there was no such overdraft. The bank books do not show any such overdraft, but show that there was no overdraft on that day or for several days before that or for several days after that. The cashier of the bank, Mr. Sowder, so testified. (Rec. p. 361.)

Paragraph 20 of the trust agreement says: "90% in amount of the *indebtedness* of the lumber company." How can it be said that on February

1st there was an indebtedness to the Coeur d'Alene bank on account of overdraft when there was no overdraft on the bank books? The mere sending out of checks to Jones, Brown & Robinson which are in the mail and which have never been presented to the bank cannot constitute an indebtedness to the bank. It appears that before these checks were presented to the bank, the lumber company had deposited moneys or papers, so that when the checks did arrive no overdrafts were created. Suppose that at the opening of business on February 1st the lumber company had on deposit with the bank the sum of $1,000, and suppose that at 10:00 A. M. it issued a check on that bank for $2,000 and mailed the same to the payee at Chicago, and suppose that at 10:05 A. M. the lumber company sent a messenger to the bank with $2,000 in currency and the same was there deposited at 10:30 A. M.; the lumber company's books at 10:00 A. M. might show a bank overdraft; at 10:30 A. M. they might show a credit of $1,000; but no matter what they showed, was there at any time between 10:00 A. M. and 10:30 A. M. an *indebtedness* on account of the lumber company at the bank? Manifestly not.

In order to get at the purpose and intent of Section 20, which provides for 90% signing, we must also read Section 10 of the trust agreement. This section provides for advancements to the extent of $100,000, said money to be used to meet the payroll "and to discharge the claims of the credi-

tors who do not execute this instrument, as the trustee may deem necessary or requisite to protect the trust estate." In other words, what the parties were trying to do was to tie up enough creditors so that $100,000 would be sufficient to meet the payroll and to pay the creditors who under the contracts with the lumber company were to be paid in *cash* and who might make trouble if they were not settled with. That was the purpose of it, and it is the purpose of the contract, its intent, that controls its language. It would have been silly to have invited the Coeur d'Alene bank to sign this trust agreement on the theory that on February 1st there was an overdraft to it, when in fact the bank books showed there was no overdraft and it was not a creditor. That bank could not be a signing creditor. It could not make any trouble. It did not have any overdraft. What the trust agreement contemplated was *net* indebtedness. Checks of the lumber company in transit which should be met by cash on hand, or checks coming to the lumber company, would of course not be taken into consideration in determining the indebtedness for the purposes of this trust agreement.

Subtracting these two items, then, from Mr. Katz's figures as to the indebtedness of the bank (including Hess, Searle and Stack), we have $801,-088.26, and the signing creditors, representing $639,940.56, 80% thereof.

But there are other matters to be taken into con-

sideration in determining this 90% question. The Central Warehouse Lumber Company's claim, according to Defendants' Exhibit No. 3 (Rec. p. 292), was $32,948.40, and that amount was not be be paid in money at all, but was to be paid in lumber (Rec. p. 44, par. 16 Trust Deed), and the same is true of the Loonau Lumber Company account of $4,239.98 (Rec. p. 320, 3), the Rogers Lumber Company account of $1,835.91 (Rec. p. 292, 320, 3), the Salzer Lumber Company account of $4,280.00, the Bardwell-Robinson Company account of $3,681.40, the Lampert Lumber Company account of $9,559.68, and the Empire Lumber Company account of $9,078.40. The Atlas Tie Company account of $14,228.85 was to be paid in logs. (Rec. p. 320, 3.) The Yeomans account of $19,500 was secured by lumber in the yard. (Rec. p. 320, 3.) These various items amount to $99,348.66. None of these items except the Yeomans account can be considered as creditors having "indebtedness," because their items were to be paid in lumber or logs and not in money.

In Vol. IV. of Words & Phrases, we find the following definitions:

> "An indebtedness is the owing of a sum of money on a contract or agreement. 3 Mich. 277."

Also,

> "Indebtedness is defined by Anderson in his Law Dictionary as the condition of owing money, also the amount owed. Indebtedness

> is the state of being in debt without regard to the ability or inability of the party to pay the same. 25 Pac. 508-9."

In Vol. II. of Words & Phrases, we find the following:

> "A debt is created when one person binds himself to pay money to another. 34 Iowa 208, 213."

Also,

> "A debt is an obligation to pay a certain sum of money due from a debtor to his creditor. 61 Md. 132, 136."

Manifestly none of these parties, including Yeomans, would make any trouble which would necessitate the use of any part of this $100,000. By "making trouble" we mean making a demand for the payment of *money*.

Furthermore, paragraph 16 of the trust deed provides that the trustee shall carry out the contract with the Central Warehouse Company, which is a contract whereby that company is to be paid in lumber, and said paragraph also provides that the trustee shall or may carry out other similar contracts.

So it was not contemplated by the parties that these people should be asked to sign the trust deed or that they should be taken into consideration in determining the 90%.

Either these claims amounting to $99,348.66, for the purpose of determining this 90% figure, should

be added to the $639,940.56, being the amount signed to the trust agreement, or they should be subtracted from the item of $801,088.26. Whichever way it is done, the result will be that more than 90% is signed to the trust deed. If we add this $99,348.66 to the $639,940.56, we have $739,-289.22. 90% of the item of $801,088.26 is $720,-979.44. So by that method of calculation there was more than 90% signed. If, however, we subtract the $99,348.66 from the total item of $801,-088.26, we have $701,939.60, and 90% of that is $631,565.64, and by that method of calculation more than 90% signed.

These figures explain why the creditors agreed with Mr. Coman at Minneapolis that when Mrs. Tolerton signed, more than 90% would have signed (*and Mr. Coman gave this testimony without objection*); and these figures also explain the correspondence between Mr. Coman and Mr. Stack and Mr. Aaron, the attorney for appellant, Merrill, Cox & Company, who drew this trust deed, and these figures show the attitude of all the parties as testified to by Mr. Coman.

On February 2nd Mr. Coman wrote from Minneapolis to Mr. Stack, stating that 90% of the indebtedness was represented at the meeting. (Exhibit No. 37, Rec. p. 218.) Mr. Coman testified (Rec. p. 220) that Mr. Gibbs presented to the creditors at Minneapolis a statement of his assets and liabilities, and that the creditors there figured it

out that when the trust agreement was signed by Mrs. Tolerton, the requisite 90% would have signed the trust agreement. *This went in without objection.* Neither Mr. Aaron nor any other person has testified to the contrary. That is why on February 7th Mr. Coman telegraphed Mr. Stack:

> "Please advise by prompt wire if you have received my letter of second with enclosures. Before trustee can act and make advances provided for under agreement, necessary that the signature of yourself and one other creditor be added. Some matters are pressing and prompt action necessary." (Exhibit No. 40, Rec. p. 221.)

On February 8th Mr. Stack replied that he had signed the papers and forwarded them to Mr. Aaron at Chicago. (Exhibit No. 41, Rec. p. 221.)

On February 5th Mr. Aaron telegraphed Mr. Coman:

> "Contract not yet returned by Stack. *Can you hurry him.*" (Exhibit No. 42, Rec. pp. 221-2.)

On February 7th Mr. Aaron telegraphed Mr. Coman:

> "Contracts received. Now awaiting Mrs. Tolerton's signature. Will wire when secured." (Exhibit No. 43, p. 222.)

On February 9th Mr. Aaron wired again:

> "Contract signed by Mrs. Tolerton yesterday. Mailing this morning." (Exhibit No. 44, Rec. p. 222.)

On the same day Mr. Aaron wrote a letter to Mr.

Coman giving him specific instructions about holding a meeting of stockholders and directors and appointing Mr. Katz, and when Mr. Katz would leave Chicago, but said nothing about the 90%, and manifestly because everybody understood that 90% had signed. (Exhibit No. 34, Rec. p. 225.)

After receiving Mr. Aaron's telegram of February 9th, Mr. Coman wrote Mr. Aaron:

> "I am in receipt of your telegram under date of the ninth advising that Mrs. Tolerton has signed the contracts. The trustee will go ahead and make the advances and take care of the payroll due, in anticipation of the arrival of the contracts." (Exhibit No. 46, Rec. p. 223.)

On February 15th Mr. Aaron wrote Mr. Coman acknowledging receipt of that letter, but said nothing about getting any other creditors to sign or having Mr. Coman check up the books, or anything of that kind, but did advise him that Mr. Katz left Sunday night. (Exhibit No. 47, Rec. p. 224.)

We submit, first, that within the spirit, purpose and intent of the trust agreement, 90% did in fact sign; and second, that whether 90% did or did not sign is immaterial so far as these appellants are concerned, because the undisputed evidence is that they all agreed with Mr. Coman that when Mrs. Tolerton had signed, 90% would have signed, and that the trust company and the bank having acted thereon and advanced the money, these appellants are now estopped, according to plain, equitable principles, from contending otherwise.

Of course the bankrupt is estopped because it knew all the facts in relation to the amount of its indebtedness and as to the claims of the signing creditors and who signed it, and the bankrupt, by unanimous vote of the stockholders and the board of trustees, ratified this trust agreement and executed the same and the money was accepted and used for its benefit.

The appellants and other signing creditors knew that the money was being used for their benefit, as the principal creditors of the bankrupt, in order to keep the business going and permit the bankrupt to carry on its business and keep out of bankruptcy, in expectation that all of the creditors would be paid in full. The appellants and other signing creditors knew that the trust company and the bank were relying upon the same statement that they relied upon, to-wit, the statement made in Minneapolis that the amounts signed for by the signing creditors were as much as 90% of the total indebtedness of the bankrupt, and knew that the money would be advanced in reliance upon that statement, and permitted the money to be advanced and accepted the benefits thereof. None of them are now objecting except three. This state of facts shows a clear case of equitable estoppel and waiver of the performance of the conditions precedent.

The elementary principle is succinctly stated in Williams v. Bank of the U. S., 2 Peters 96, at page 102, as follows:

> "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by an act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the conditions."

In Insurance Company v. Norton, 96 U. S. 234, the Supreme Court again stated the principle, or a similar principle, at page 240, as follows:

> "The written agreement of the parties, as embodied in the policy and in the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted upon. *But a party always has the option to waive a condition or a stipulation made in his own favor.* The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of this agent, a waiver of the stipulation or notice *would not be repugnant to the written agreement,* because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not, was a fact *provable by parole*

evidence as well as by writing, for the obvious reason that it could be done without writing."

An interesting case is California Raisin Growers' Association v. Abbott, 117 Pac., p. 767 (Cal.), the court saying at page 770:

> "By their answers, appellants aver that the contracts were delivered to plaintiff in escrow and were not to become operative until eighty-five per cent. of the raisin-bearing acreage of the State was secured by contract; that such percentage was never brought within the control of plaintiff, and that, therefore, the contracts could not be enforced. A complete answer to this contention is that the growers did deliver their raisins under the contracts and accepted money from the plaintiff. Even if delivery of the contracts in escrow with the proviso alleged were tolerated (and it is not—Civil Code, 1056, 1626, 1627), the acceptance of the terms of the contracts by the producers of raisins waived the escrow agreement."

In this connection we again cite a recent decision of this court:

> *In re Creeh Bros. Lumber Co.*, 240 Fed. Rep. 8.

We respectfully submit the order should be affirmed.

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No. 3110

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,

Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and THE EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company, Bankrupt,

Appellees.

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, Bankrupt.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

(Numbers refer to pages of printed record.)

We desire to reply to appellees answer brief:

In the first instance, we desire to correct certain statements made in their "statement of facts".

Counsel states that Mr. Gibbs submitted to the creditors at Minneapolis a statement of assets and liabilities and that the creditors figured that when the trust deed was signed by Mrs. Tolerton that that would constitute 90% of the debts of the company. The record shows that this testimony was given in a voluntary manner by Mr. Coman but immediately following it appears the following:

> "Mr. ADAMS. I move to strike that out as a voluntary statement without any question.
> The REFEREE. It may be stricken." (Rec. 220.)

The record is silent so far as the writer knows, of any attempt on the part of the appellee to renew this testimony.

Again counsel without the semblance of a record to bear out his assertion, states that the witness, Katz, was an adverse witness "friendly to his Chicago friends" etc. Mr. Katz's testimony was frank in every respect nor is there any ground for the assertion that he was in any manner or form adverse to the appellees.

We also take exception to the statement of counsel that it was understood that the trust company would get $100,000 to be advanced to the bankrupt from the Exchange National Bank and that this was talked over and understood at the Minneapolis meeting.

The record with reference to this subject is that Mr. Coman, the president of the Exchange National Bank and at least the guiding hand and spirit of

the Mechanics Loan & Trust Company, testified that he had a conversation with the vice-president of the Fort Dearborn National Bank who wanted to know the responsibility of the trustee and that Mr. Coman told him that while the capital of the trust company was only $10,000 that it could get the money from the Exchange National Bank. While Mr. Coman testified as an interested party in every respect, still he admitted that these various discussions were all had prior to either the drawing up of the contract or at least before it was signed (217) so that whatever arrangement was had with reference to who should advance the money, merged into the written agreement which is surely sufficiently plain to speak for itself without the aid of oral testimony in explanation thereof.

Counsel further states that the Exchange National Bank had not kept in touch with the bankrupt. Mr. Coman testified that he was the banker and connected with Mr. Gibbs, the managing officer of the bankrupt. He stated (216) that he went to Minneapolis with Mr. Gibbs; That his bank (Exchange National) was the owner of the bonds of the Dryad Lumber Company, the subsidiary corporation of the bankrupt, amounting to $100,000.00; That before the meeting was called by Mr. Coman and even before he went East, Mr. Coman caused his attorney, Mr. Post, to in fact prepare a trust deed along the lines of the trust that was afterwards consummated (216). In addition to this, it affirmatively appears (246) that be-

fore the meeting was called at Minneapolis by Mr. Coman, that Mr. Coman discussed the whole proposition with Mr. Gibbs and even sent a representative to Coeur d'Alene to inspect the affairs of the bankrupt (246). This is based not upon the testimony of the so-called "adverse witness" but upon the admission made in open court by Mr. Coman and every inference points to the fact that Mr. Coman did in fact know the true condition of the bankrupt before he went to Minneapolis. Mr. Coman is an astute, clever banker and we cannot understand the denial of counsel that he, being in touch with Gibbs, calling the creditors together at the instance of Gibbs, causing a trust deed to be prepared which would not only protect his bank but would pay part of its indebtedness unknown to the other creditors and would further the operation of the plant of a client of the bank of which he was the head, going into this thing blindly and accepting the unsupported word and representation of a man, where there was involved practically three quarters of a million dollars in debts and where his own bank intended as he now claims, to further advance the sum of $100,000. In addition to this, counsel stated that Merrill, Cox & Company had prior to this time, sent an accountant to go over the affairs of the bankrupt. So far as the record shows, there is no testimony to support any such assertion. We insist, however, that the entire record bears out the assertion that Mr. Coman did in fact know more

about the precarious financial condition than any one else, except HIS friend, Gibbs.

Argument.

Taking up the argument of counsel, we desire to first notice the eleventh assignment wherein the appellee states that there is no support to the theory of the appellants, that the signing creditors are not bound by the trust because of false and fraudulent representations of Mr. Coman and further states that there is no evidence to bear this out. We insist that the whole record is a mass of testimony which does bear this out. It is shown that Mr. Gibbs did submit a statement to the creditors at the meeting at Minneapolis; That he was accompanied and brought to the meeting by Mr. Coman who either by his silence or express representations and it is immaterial which, did not dissent but acquiesced in it. The condition that is afterwards shown by the statement made up by Mr. Katz shows the concern to have been hopelessly and helplessly insolvent at that time. If we speak of good faith, then the representative local banker of the bankrupt who calls together a meeting of creditors; who impliedly infers that his assertions are true; who inveigles creditors holding claims aggregating more than three quarters of a million dollars, to repose in him and his associates sufficient trust and confidence that in a manner they pledge their claims

to the payment of a further extension of credit of $100,000—then if this sort of testimony has no bearing on the good or bad faith of a trustee, the writer is at loss to understand the rules of equity and the law with relation to the good or bad faith of trustees.

With reference to this question of good or bad faith, counsel says that no express reservation was made in the record to show that we are claiming bad faith. The entire record shows that the appeal is practically based upon the unconscionable, faithless acts of the appelles. Page after page of the record was consumed to show that the Exchange National Bank secured $15,000 out of the trust funds that the trust company was supposed to advance, page after page was consumed to show that a secret record was made of this transaction. Records were introduced by Mr. Post to show that notwithstanding the fact that the bank claimed that the $15,000 was never in fact loaned but that the notes were returned long prior to the meeting at Minneapolis, yet in fact they were not returned nor even marked cancelled until after the signing of the trust deed, and then it was further expressly shown that long after the signing of the trust deed the bank received interest upon the indebtedness created by these notes paid out of this "trust fund" and accepted the same and credited the same upon the books of the bank. The great bulk of the recorded testimony is then to the effect that the bank had acted in bad faith and dishonestly and we can easily

understand why counsel would want to put aside this question on the technical grounds that the express reservation is not made in the petition for review of bad faith in so many words. The petition for review recites many grounds of error where this could be introduced, was introduced and argued and was entertained and considered by the District Judge both in the oral argument and in the written brief submitted.

JURISDICTION.

We direct attention to the square and emphatic admission made by them that they stand or fall upon the two propositions; one, that they have a lien on all of the property of the bankrupt and second, an equitable assignment of the claims of the signing creditors. (Appellees' Brief, p. 17.)

The jurisdiction of the federal courts to afford the appellees adequate relief if they are entitled to any, is so clearly within the knowledge of your Honors that we do not deem it necessary to answer that part of the answer brief wherein it is stated that in the event that Judge Dietrich's decision is overturned, the appellees would not have an adequate remedy.

Nor do the decisions cited by counsel in any way modify or change the general rule that the referee was without jurisdiction to make the order that was appealed from, and we will briefly notice some of the decisions that are cited by counsel.

Counsel states that the question of jurisdiction is settled beyond controversy by the Supreme Court of the United States in *Whitney v. Wenman,* 198 U. S. 539; 45 L. ed. 1157. This action was an action by the trustee against a third party holding property belonging to the estate and by either fact or inference could not be pertinent to the case at bar. The matter decided is so clearly stated in the syllabus that we content ourselves by quoting therefrom in its entirety to show that the court had in mind no such state of facts as is presented by this appeal.

> "Jurisdiction of a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine rights in or liens upon property which, under the facts as admitted by demurrer to the bill, came into possession of a court of bankruptcy as property of the bankrupt, whether held by him or for him, was conferred on such court by the bankrupt act of July 1, 1898, paragraph 2 (30 Stat. at L. 545, Chap. 541, U. S. Comp. Stat. 1901, p. 3420), authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy; and such jurisdiction is not ousted by an unauthorized surrender of the property by the receiver in bankruptcy."

The same thing is true of the case of *In re Antiago Screen Door Company,* 123 Fed. 249, which was merely litigation between the trustee and a

mortgagee as to the legality of a mortgage given by the bankrupt prior to bankruptcy. Herein the bank had filed a petition praying that it might have the fund realized to the amount of the mortgage and where the court held that the mortgages were void. From this order, an appeal was taken and the court in the opinion (253) says:

> "We are disposed to hold (although the case is one not free from difficulty) that the order is one made in the bankruptcy proceedings proper. The general rule of practice of the courts is not without weight, although the particular question is not suggested in most of the cases which recognize the practice. The mortgaged property was in equity, the property of the bankrupt, subject to such lien as the mortgagee had thereon. *If its value was in excess of a valid lien, that excess would go to the trustee.*"

How anything that was said in either of the two last cases which counsel insists is decisive of the case at bar, could guide or govern a court in determining this controversy is beyond comprehension.

Likewise, the case of *In re Paris Modes Co.*, 196 Fed. 357. Here was a case where one Gaines was the treasurer of a publishing company and made a mercantile statement wherein he claimed that the publishing company owed nothing. On this statement a printer advanced credit to the bankrupt and after the bankrupt had been adjudicated insolvent, Gaines filed a claim for many thousands of dollars against the estate. In the proceedings in the District Court it was ordered that the order allowing the claim of

Gaines be modified to the extent that so much of the allowance representing indebtedness of the bankrupt prior to the time of the making of the false statement should be postponed to the claim of the printer and this order was never appealed from; this order seems to have been entered by agreement. Judge Lacombe, the Circuit Judge, who reviewed this case in the Second Circuit in connection with Judges Ward and Noyes [regardless of the fact that no error predicated or appeal taken], questions the right of the referee or the District Judge to make any such order (p. 358, 196 Fed.):

> "The difficulty with the plan followed by the District Court is, first, that it does not accord with the order of June 22; and second, it takes money awarded to Gaines as a dividend on his claim of $199,000, and turns it over to the Wynkoop Company, as damages for a tort, *which we think the bankruptcy court has not jurisdiction to do. The company can take that cause of action to a state court and try it there. This we understand it had done.*
>
> *The order is reversed and cause remanded, with instructions to distribute the balance of dividends $12,250 or whatever it may be in accordance with the views expressed in this opinion.*"

Notwithstanding that all the parties attempted to confer jurisdiction, the Circuit Court of Appeals refused to permit the distribution of the funds in the manner thus ordered and stated that it was a matter for a plenary action in a court of competent jurisdiction. While counsel states that the distribution of these funds was enforced by a court of bank-

ruptcy according to the agreement between the parties in that case, yet the court refused to entertain jurisdiction of a controversy between the parties as to the right to the dividends and referred them to their rights in a plenary action at law, nor can we comprehend how counsel comes to cite this case (Appellees' Brief, p. 20) as antagonistic to the appellants' theory of want of jurisdiction on the part of the referee to make the order complained of.

The proposition that is advanced by counsel that in order to avoid the rule against multiplicity of suits that not only must the remedy be efficient but that it must be a remedy in the same jurisdiction, is supported by no law nor is it the rule. If a full complete and adequate remedy at law exists, no matter in what jurisdiction it lies, then equity refuses to interfere and this is true notwithstanding the general rule of convenience in this class of cases, because it is almost invariably combined with other circumstances of inadequacy and is too indefinite to safely afford an independent ground for the interposition of equity. (*16 Cyc.* 42.)

When these parties met in Minneapolis and there entered into this contract, each of the parties knew of the residence of the other. The Mechanics Loan & Trust Company, for instance, knew that the legal residence of Merrill, Cox & Company was in Chicago, nor can it now be heard to say that because a fund happens to be near the particular jurisdiction of the appellees that on that ground should equity interpose its helping hand and take juris-

diction over all the parties who find themselves in the unfortunate position of signers to the trust deed.

The criticism that is directed to the *Henry* case, 145 Fed. 316, is equally without merit. As has been stated in the original brief filed herein in that case, the conflicting claims of two claimants was not permitted to be litigated in the bankruptcy proceeding because the entire estate was not interested in the controversy nor could it by any circumstances enure to the benefit of the general estate. The court in its opinion, however, stated that neither of the claimants were parties to the bankruptcy proceedings which we consider immaterial, but in the opinion of the writer the appellants in this action are no more parties to the bankruptcy proceeding in the sense that the word "parties" is usually used than is a creditor who in order to secure his claim advises a court by appropriate petition that a debtor has died and thus starts the wheels turning which ultimately causes the estate to be administered. These appellants nor the appellees are in no sense litigants in the bankruptcy proceedings. They may have by their petition caused the bankruptcy proceedings to have been instituted and they may have filed their claims against the estate, but this does not make them parties to the litigation. Appeals could be taken, orders could be made, a discharge refused or allowed and a multitude of other proceedings taken without notice to them, without their consent and without their sanction.

In a late case by the Supreme Court of Arkansas, the right of bankruptcy courts to consider these indefinite actions is discussed and the authorities are reviewed:

> "It is also true that referees in bankruptcy 'take the same oath of office as judges of the United States courts,' are referred to 'as an arm of the bankruptcy court, invested with certain judicial powers,' and as 'a court of very great importance in the administration of bankrupt assets and the determination of conflicting rights arising thereunder,' and in their hearings within the scope of their powers are clothed with the authority of judges. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183; Loveland on Bankruptcy, 205; Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158; in re Simon & Sternberg (D. C.) 142 Fed. 593. 'Judge,' however, as defined in the act, means a judge of a court of bankruptcy, not including the referee. See Bankruptcy Act.
>
> Proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy, *and are not separate or independent suits in law or in equity;* the Bankruptcy Act being passed to provide a quick and summary settlement of debts against the bankrupt out of the proceeds of his estate, and proceedings originally commenced as part of the bankruptcy suit are not separated from it and converted into a suit at law. Wiswall v. Campbell, 93 U. S. 347, 23 L. ed. 923; Leggett v. Allen, 110 U. S. 741, 4 Sup. Ct. 195, 28 L. ed. 313.
>
> *It is settled that bankruptcy courts under the present Bankruptcy Act have no jurisdiction of independent suits at law or in equity.* Bardes v. Bank, 178 U. S. 535, 20 Sup. Ct. 1005, 44 L. ed. 1175. It was there said:

'Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words "at law" in the opening sentence, conferring on the courts of bankruptcy "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity. The section nowhere mentions civil actions at law or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to being in and substitute additional parties, "in proceedings in bankruptcy," and in clause 15, to make orders, issue process, and enter judgments, "necessary for the enforcement of the provisions of this act." '

In Bush v. Elliott, 202 U. S. 479, 26 Sup. Ct. 670, 50 L. ed, 114, the court said:

'The Bankruptcy Act of 1898, in respect to matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy.'

As said in the Bardes case:

'Congress, by the second clause of section 23 of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy

to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, "unless by consent of the proposed defendant," of which there is no pretense in this case.'

See also, Bank v. T. & T. Co., 198 U. S. 291, 25 Sup. Ct. 693, 49 L. ed. 1051.

It is evident from these authorities that there was no intention upon the part of the lawmakers to give the bankruptcy courts jurisdiction to render personal judgments against bankrupt debtors as in civil suits at law or in equity, and there was no such judgment attempted to be rendered in said court. The allowance by the referee of the claim was within the jurisdiction of the referee in the bankruptcy proceeding, and binding and conclusive against the bankrupt's estate, unless reversed upon appeal."

Maryman v. Dryfus Co., 174 S. W. 549-550-551.

The writer, who was not the author of the original brief in this case, desires to call attention to that part of the appellees' brief wherein we are accused of criticising Judge Dietrich. Not only the writer but each of counsel for the appellants have the highest regard and highest respect for the learning, ability and integrity of the Judge from whose decision this appeal is taken. In the present case, we have disagreed with him, but we have not criticised him nor is an assertion of this kind in keeping with proper ethics in any litigation. Neither is our assertion of what we deem a mistake on the part of the District Judge made with any meaning of criticism or disrespect, but what is stated in appellees' brief

which we consider not only wholly incomprehensible but not in keeping with this discussion. We sincerely trust that by mistake it has crept into their answer brief and it is not intended as it appears, to be cheap politics.

REAL PARTY IN INTEREST AND RIGHTS OF BANK AND TRUST COMPANY.

As counsel for appellee has disposed of the good or bad faith of the appellees by ignoring the argument of the appellants so again does it desire to waive aside any discussion on the subject of subrogation. They say in the brief "as we deem that the principle of subrogation is not involved in this matter but quite a different principle which we have discussed below, we have not read the authorities cited and make no reference thereto." (Appellees' brief, p. 30.)

Yet by no other principle of law can the Exchange National Bank reap any benefit except through this principle, although it is now contended by appellees that they claim solely on the theory of assignment. In one of the cases cited by appellees in support of the right of the court of bankruptcy to enforce an assignment, is the case of *In re Breakwater Company*, 232 Fed. at page 375. (Appellees' Brief, p. 23.) Here it was said:

> "A claim known as that of the Delaware Commissary Company, or the Joseph De Luca claim, against the bankrupt estate, was duly made and

allowed. The allowance was in part of a preferred claim. The petitioner was in fact a creditor, *not of the bankrupt, but of the claimant.* The only right he can possibly assert is that of an owner of part of the proven claim. Assignees of claims have the right, under the provisions of the bankruptcy law, to prove them against the estate just as other claims may be proven. The same limitation of time in which to make the proofs applies. This claimant delayed availing himself of the right thus given until the statute closed upon it. The right, in consequence, no longer exists. This is what the referee ruled and in this there was no error.

It is manifest that there was no need for such proof of claim, even if it had not been barred by the statute. The claim as against the estate had already been proven and allowed. There would have been neither need nor propriety in proving the claim over again. The petitioner, if he belongs anywhere, is clearly not in the proofs of claims class, but in the order class. The controversy, if there be any, is just as clearly not between the petitioner and the estate, but between the petitioner and the claimant. *Neither the estate nor the other creditors are concerned in the dispute.* General Order No. 21, section 3 (89 Fed. ix, 32 C. C. A. xxii), has application to assignees of proven claims. Section 57n applies only to claims against the estate. *The petitioner, if he can succeed in proving that he holds an assignment of the De Luca claim, may be subrogated as such assignee to the rights of the original claimant.* So far as the record discloses, this he has not asked to have done. We do not feel at liberty at this time to pass upon the right of the petitioner to subrogation. If he deems himself entitled to such right, it cannot in any orderly or satisfactory way be determined until he claims it. It may then be passed upon by the referee."

In this connection as to whether or not the trust deed is valid operates as an assignment, let us in turn quote the same portion from the trust deed that is quoted by the appellees, being paragraph 10 thereof:

> "The trustee shall advance such sums of money as it shall deem necessary to meet the present payroll of the lumber company and the mill company and to discharge the claims of the creditors who do not execute this instrument as it may deem necessary or requisite to protect the trust estate, not to exceed, however, the sum of $100,000, and the trustee shall have a *first and preference claim* upon said trust estate for the amount of such advancement, and the same shall be repaid to it out of the first proceeds of sale of the trust property or any part thereof or the first proceeds of any of the collected accounts or bills receivable, together with interest thereon from the date of such advancement at the rate of 6% per annum."

Supposing for the sake of argument that the trust deed is valid in every other respect, would this provision (and it is the only provision which creates either an assignment or a lien), create an assignment which in the first instance would authorize a court to either subrogate the appellees to the rights of the appellants or authorize a court to deliver funds due the appellants to the appellees without first a reformation of the contract or a judicial construction as to the intent of the parties? We think it is self apparent it would not, yet counsel states that the principle of subrogation is not involved and that he has not taken the pains nor gone to the trouble of reading our citations under this head.

If a court of bankruptcy is a court of general jurisdiction, if mortgages can be foreclosed as between third parties in which the creditors of an estate have no interest, if the ills, woes and troubles of mankind can be adjusted and settled therein, if contracts in which the general estate has no interest can be construed, if Congress did not know what it was doing when it conferred a limited jurisdiction on a court of bankruptcy, then the law cited with reference to construction of contracts, elementary law that we first learned when we studied the law of contracts and when the paths of lawyers seems strewn with roses and complexities could not arise, let us then admit for the sake of argument that the United States Supreme Court in the two cases cited by counsel spoke truly when it said that equity would favor such construction of a contract as equity could favor; but this court is not concerned in the construction of any contract in which the general creditors of this estate are not concerned.

Neither have we any fault to find with the law laid down in *Lecombe v. Steels*, 20 Howard 94, wherein the court says that in determining the construction of a contract, courts of equity make a distinction between matters of substance and matters of form. Herein the court refers to the land contract between A and B where a title should be cleared by the 25th of the month and was not cleared until the 26th and held that this was a substantial compliance with the contract; but what would the court have held in that case if C, a

stranger to the contract, an interloper, would have attempted to hold A to a contract made with B; would it hold that this was a "mere matter of form"?

Counsel state that it is patent "without the testimony that the parties understood exactly what would be done. That is shown by the correspondence and by the conduct of the representative, Mr. Katz." (Appellees' Brief, p. 37.) In this connection, we desire to take exception to the argument that is advanced by the chief counsel for the appellees, whose personality creeps throughout the entire brief wherein he refers to Mr. Katz as "the friend of the appellants", "the adverse witness" and "their representative, Mr. Katz." The record shows that when Mr. Katz came to Spokane, he became the confidant of Mr. Coman; that he wrote no letters to any creditor except in the office of Mr. Coman and that most of them were dictated by Mr. Coman; that everything he did while in charge of the plant was under the direct personal supervision of Mr. Coman and these various expressions used in this manner are far from ethical or professional.

Counsel cites the case of *Randolph v. Scruggs*, 190 U. S. 533-47 L. ed. 1165, which is merely a reiteration of the principle that in cases of assignment for benefit of creditors, services rendered or moneys paid which enure to the benefit of the estate can be paid out of the general estate; nor does this principle proceed upon the theory that the assignment for the benefit of creditors is so phrased as to create

such a lien but rather upon the general law. What the Supreme Court said was as follows:

> "It does not follow, however, from the avoidance of the deed that the service of preparing it did not raise a valid debt. There is no sufficient reason why it should not when once it is decided that the service for which the debt is alleged was lawful when it was rendered. Re Lains, 16 Nat. Bankr. Reg. 168, 170, Red. Cas. No. 7989.
>
> The more difficult question is how to deal with the services rendered to the voluntary assignee. *The claim for them must be worked out through the assignee, and cannot be put higher than his claim for allowances, supposing that they had been paid. We may assume that there is no question of form before us, and that whatever the appellants properly might have been paid by the assignee they may prove for now.* See Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 124, 125, 28 L. ed. 915, 918, 5 Sup. Ct. Rep. 387; Mason v. Pomeroy, 151 Mass. 164, 167; 7 L. R. A. 771, 24 N. E. 202. But it has been held that the assignee, even of a corporation, cannot be allowed anything for his services before the filing of the petition in bankruptcy. See e. g. Re Peter Paul Book Co. 104 Fed. 786. *So far as* this opinion rests on *constructive fraud,* we have indicated above *that it does* not command our assent. The case *would* be different if the assignee were party to an actual fraud. Hastings v. Spencer, 1 Curt. C. C. 504, 507, Fed. Cas. No. 6201; Smith v. Wise, 132 N. Y. 172, 178, 30 N. E. 229; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 401, 28 L. R. A. 277, 17 So. 171. But the assignee is acting lawfully in what he does before proceedings in bankruptcy are begun, and although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still, so far as his services, or

services procured by him, tend to the preservation or benefit of the estate, the mere fiction of relation is not enough to forbid an allowance for them. See Lynch v. Bernal, 9 Wall. 315, 325, 326, 19 L. ed. 714, 716. This is the doctrine of the state courts with reference to the operation of insolvent laws upon voluntary asignments, and of the better-considered decisions under the bankruptcy laws. Platt v. Archer, 13 Bltachf. 351, Fed. Cas. No. 11,214; Havemeyer v. Loeb, 5 Abb. N. C. 338, 345; Mcdonald v. Moore, 15 Nat. Bankr. Reg. 26, Fed. Cas. No. 8763; Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163, 169; Hunker v. Bing, 9 Fed. 277; Re Kurth, 17 Nat. Bankr. Reg. 573, Fed. Cas. No. 7948; Re Scholtz, 106 Fed. 834; White v. Hill, 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726; Wakeman v. Grover, 4 Paige, 23, 43, 11 Wend. 187, 25 Am. Dec. 624; Collumb v. Read, 24 N. Y. 505, 515; T. T. Haydock Carriage Co. v. Pier, 78 Wis. 579, 47 N. W. 945; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 28 L. R. A. 277, 17 So. 171. See Williams v. Gibbs, 20 How. 535, 15 L. ed. 1013; Internal Improvement Fund v. Greenough, 105 U. S. 527, 532, 26 L. ed. 1157, 1160; Thompson v. Phenix Ins. Co. 136 U. S. 287, 294, 295, 34 L. ed. 408, 412, 10 Sup. Ct. Rep. 1019; Woodruff v. New York L. E. & W. R. Co. 129 N. Y. 27, 29 N. E. 251. If beneficial services are allowed for they are to be regarded as deductions from the property which the assignee is required to surrender, and in that way they gain a preference. Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; Re Scholtaz, 106 Fed. 834; White v. Hill, 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer, 151 Mass. 74, 23 N. E. 726.

We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we

must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen.

It does not appear how far the services to the assignee were beneficial. Therefore the questions of the circuit court of appeals cannot be answered in full. But the principles as to which it desired instruction may be stated sufficiently for the disposition of the case upon a subsequent finding of facts. None of the claims is entitled to preference under the deed. The charge for the preparation of the assignment properly may be proved as an unpreferred debt of the bankrupt. The services to the voluntary assignee may be allowed so far as they benefited the estate, and, inasmuch as he would be allowed a lien on the property if he had paid the sum allowed, the appellants may stand in his shoes, and may be preferred to that extent. No ground appears for allowing the item of services in resisting an adjudication of bankruptcy. See Platt v. Archer, 13 Blatchf. 351, 354, Fed. Cas. No. 11,214; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 398, 28 L. R. A. 277, 17 So. 171; T. T. Haydock Carriage Co. v. Pier, 78 Wis. 579, 582, 47 N. W. 945; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726.

We answer the questions as follows: (1) No. (2) Not under the deed, but, so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. (3) Not on the facts appearing in the certificate. (4) The charge for the preparation of the deed may be proved as an unsecured claim."

Equally elementary is the Massachusetts case cited, *Mason v. Pomeroy*, 151 Mass. 164; 24 N. E. 202, but is nowise instructive in the present action.

In the case *In re Chase,* 124 Fed. 753, and *Hurley, trustee, v. Railroad Co.,* 213 U. S. 132, merely bear out the general law that an assignee who benefits an estate may have, under certain circumstances, a preference claim therefor.

Digressing for the moment, however, there is no doubt in our mind what each of these courts would have said had the claimant asked that the dividends due to a third party be subrogated to the payment of his claim rather than his preference claim being paid out of the general estate, as in the case at bar. These cases are in nowise analogous nor have we any fault to find with them. The case *Atchison etc. Railroad Co. v. Hurley,* 153 Fed. 503, was where the railroad company being adjacent to a coal mine had advanced money to the company to be paid out in coal and upon the bankruptcy of the operating company asked a preference claim against the estate. It is also distinctly a litigation between the original contracting parties. The facts were in nowise analogous or even similar to the case at bar nor is this action from which counsel has quoted in any manner instructive here.

Neither have we any fault to find to the principle stated in *Ford v. Williams,* 21 How. 289, where it is stated that an undisclosed principal may sue but that principle does not apply to this class of cases in any event and especially does not apply where it appears that this agency acts as a fraud upon those who were to be bound by the agreement; it would not apply where an undisclosed principal

signs the agreement as a party to be bound thereby falsely representing that the concern is solvent; falsely represented that they owed it $6000 when in fact they owed it $21,000; prior to the time of claiming that it is a principal permitting its chief officer to testify that obligations in its hands, of the bankrupt, were null and void and that no credit had been extended thereon; that it was not treated as an indebtedness and long after the signing of the trust deed received from the insolvent creditor interest upon such indebtedness that it claims never existed, and retaining this same interest out of the very moneys that today they are asking be repaid to it. This matter, however, will be gone into more fully on the question of bad faith.

Much of the brief is occupied under this heading of the academic principle of the right of a holder of negotiable paper to sue whether or not he is the real party in interest. This is a principle generally founded on statute and in nowise concerns us in this action.

BAD FAITH.

In answering what counsel has to say on the question of the good or bad faith of the trustee and the bank, let us suggest to the court that in this and every action of kindred character where fraud is claimed, the full extent of the fraud is probably never discovered. In the following pages we will attempt to show piecemeal to the court,

the various accounts of fraud that we are in possession of. These accounts of frauds were wrung out of the mouth of one of the cleverest and most astute bankers in the northwest, by his own admission on cross-examination. We submit to the court, therefore, that this man who did attempt to hide from the appellants the true state of facts in this action, who was the close confidant and banker of the president of the bankrupt, the only interested party, the hand guiding the affairs of the bankrupt concern after the execution of the trust deed; who of necessity must have known of the precarious condition of the concern, at least after the time the trust was consumated and who kept silent and permitted money to be distributed and wasted, knew far more of the things that acted to the detriment of non-resident creditors than he was finally forced to admit while on the witness stand. The appellants contend and will always contend that Mr. Coman went to Minneapolis with the intention of deceiving these creditors; with the intention of assisting his client, Gibbs, and with the intention of gaining an advantage over every other creditor. Counsel would have this court believe that this bank and trust company acted in the best of faith with open conscience and clean hands as did the president of the bank attempt to make the appellants believe this fact until he was confronted with his own records when, although not a youth or an incompetent person, he sat dumb and voiceless when confronted with the fact that the records of his own

bank showed that he had perpetrated the fraud that the appellants claim was perpetrated. This has been gone into in the original brief but let us again briefly review it.

Mr. Katz testified that when he came to Coeur d'Alene to take charge of the Stack-Gibbs Lumber Company as the representative of the Mechanics Loan & Trust Company that the books of the bankrupt showed that the indebtedness to the local bank was $21,000 and not $6000 as the bank had represented. When Mr. Coman was cross-examined as to the existence of this difference of $15,000, he stated (Rec. 229):

> "In regard to the $15,000 note referred to by Mr. Katz in his testimony, dated December 31, 1915, and marked on the books here as cancelled or paid on February 14, 1916, Mr. Gibbs was negotiating a loan based on some collateral that was to come from a lumber concern in Denver. The collateral never came and the arrangement was never perfected. * * * I have here a copy of the Stack-Gibbs Lumber Company account from January 1st, 1916, and you will notice that during that month there was no credit of such an amount. * * * The item of $15,000 was never put to the credit of the Stack-Gibbs Lumber Company. The books of the bank and the lumber company would never agree so you could not produce anything."

Then again in (Rec. p. 230):

> "The $15,000 item is not on our books at all but I have some other books here that will show something about it. This only shows in a negative way that no such transaction took

> place between the Stack-Gibbs Lumber Company and the Exchange National Bank. This is a complete record of every loan made between the 31st day of December and the 15th day of February and which contains loans made to everybody else."

Under cross-examination, Mr. Adams stated that he would like to have the daily balance books of Februarly 5th and from the 15th of December up to the 15th of March—the Customers' Ledger. These were produced (Rec. p. 233):

> "Mr. ADAMS (reading from the books produced): Under December 30, state 233, under the column 'dates' is Stack-Gibbs Lumber Company, numbers 5 and 6, $5000, $10.000, 8-8, C. G. Gibbs. I would like to know when those notes were paid."

The witness apparently had no idea that this transaction had crept upon the books and at first refused to answer, finally blurting out, "we carry a separate account with Mr. Gibbs". (This entry appears in the bills receivable journal which was introduced in evidence.) (Rec. 234.)

It was immediately following this astounding testimony that the Exchange National Bank came into court and filed the unique petition that has been filed in this action, praying that the relief that was subsequently accorded or afforded be granted. (Rec. p. 235.)

If this were all, it might be explained but the record does not stop because after an adjournment had been taken and after Mr. Coman had had

ample time to think over what the effect of his testimony would be, after in all probability he had gone back to his bank and inspected his records and after counsel for appellants had found records of this transaction with pages pasted together as the record shows, he resumed the stand and again attempted to explain this $15,000 item. His explanation appears on page 236 of the record. He says:

> "Since my former testimony and upon returning to Spokane, I got hold of the records of the bank in respect to the two notes, one for $10,000 and one for $5000 * * * and these records I have shown to counsel. * * * There appears bills receivable, 27075, representing a loan for $5000 in the name of C. D. Gibbs, line 17 is 27076 and represents a loan of $10,000 to C. D. Gibbs. * * * On line 16 appears the endorsement, Stack-Gibbs Lumber Company. It also appears on page 261 under date, January 25, 1916, line 25, the following entry *representing a payment of notes, C. D. Gibbs, $5000, No. 27075, * * * and on the same date on page 262 appears the entry, loan paid $10,000*, C. D. Gibbs, No. 27076. This is on January 25, 1916, and is before I went to Minneapolis."

In this connection we will again show that this testimony was knowingly false because the notes were neither returned nor stamped paid until long after the meeting in Minneapolis and that interest was paid by the lumber company on these two notes and received and credited by the bank out of the very funds that it is claiming the trustee

advanced subsequent to the signing of the agreement but before we go into this, listen to the explanation of this astute banker as to why these notes appeared upon the records of a national bank.

> "The $10,000 note was used as a balance note and it was credited up in the books of the bank in Stack-Gibbs Lumber Company account No. 2 of which I have the duplicate sheets showing on December 30, 1915, a credit of $100,000 and on *January 25, 1916, a payment of $10,000 which also represents a closing entry on the books cancelling the other $10,000 note.*" (237.)

Now in connection with this testimony let us again refer back and quote:

> "That item of $15,000 was never put to the credit of the Stack-Gibbs Lumber Company." (Rec. 229.)

The record further shows that on February 12, 1916, a letter was written by the Stack-Gibbs Lumber Company to the Exchange National Bank as follows:

> "February 12, 1916.
>
> Exchange National Bank,
> Spokane, Washington.
>
> Gentlemen:
>
> We are herewith enclosing our check No. 2774 for $153.33 interest for forty days on the 14th on $10,000 and $5000 demand notes dated 12-30-15. If this meets with your approval kindly cancel the notes and return the same to us.
>
> Yours truly,
> STACK-GIBBS LUMBER CO."
>
> (238.)

The answer to the letter appears as follows:

"February 14, 1916.
Stack-Gibbs Lumber Company,
Gibbs, Idaho.
Gentlemen:
I acknowledge receipt of your letter of the 12th enclosing check for $153.33 interest on demand notes which are cancelled and returned herewith.
Yours very truly,
E. T. COMAN,
President." (238.)

As a final evidence of the duplicity of the bank, let us read then the explanation that is given by the president of the bank as to why they accepted interest upon an obligation that they claim never existed.

> "I left for Minneapolis the last week in January *and just before I left, I charged off the $15,000.* I do not know why I did not send the notes right back. We charged the whole $15,000 off on the 24 and 25 of January and charged the company with interest up to the 12 of February." (246.)

(But why any interest should have ever been charged on this item if what Mr. Coman says is true is beyond comprehension.)

> "I told Mr. Gibbs about it." (Rec. 246.)

It was at this point that Mr. Adams confronted the witness with these letters and a cancelled check of the Stack-Gibbs Lumber Company showing that the interest had actually been paid on this indebtedness long after the signing of the trust deed in Minneapolis. Then listen to the explana-

tion of the president of the bank of this transaction.

> "The check that you show me signed by the Stack-Gibbs Lumber Company by Mr. Gibbs together with the voucher is the check and voucher and my letter showing the payment of interest up to that date. *Apparently Mr. Gibbs did not object to paying interest after we charged it off and we made no objection to receiving it."* (247.)

Again on record 251 under cross-examination:

> "Mr. Adams. I do not want any misunderstanding about any question that I ask. In this particular instance, the record shows the maker to be C. D. Gibbs.
>
> A. Yes, sir.
>
> Q. Gibbs endorsed Stack-Gibbs Lumber Company?
>
> A. Yes, sir.
>
> Q. Now to whom did the credit go, *the money itself?*
>
> A. Why, $5000 of it went on a certificate of deposit that was retained by the bank.
>
> Q. And the $10,000?
>
> A. *Why, the $10,000 went to the credit of this balance account which was called Stack-Gibbs account No. 2."* (Rec. 251.)

In view of this resumé of the testimony, counsel for appellee boldly state that the conduct of the appellees is in accord with common honesty and fair dealing and that the present conduct of the appellants is not in accord with honesty and fairness.

Throughout the argument under this head, counsel refers to Katz as "Aaron's friend", a fact not borne out by the record and which is untrue and the reiteration throughout the argument that the

trust deed was drawn by Mr. Aaron which, while we are going out of the record in so stating, is denied by him. We do know, however, that some sort of a trust deed was drawn by Mr. Post at the instance of Mr. Coman and taken with them to Minneapolis, and for which Mr. Post was paid.

The argument directed to the question of whether or not there was an overdraft in the Coeur d'Alene bank and the bank in Spokane is equally unreasonable. If the writer has a balance in the bank of $1000 and gives a check to A of $2000, he has overdrawn his account so far as his knowledge is concerned and his records show. If A fails to present the check for payment, does not minimize the fact that the writer has overdrawn his account on his books. Whether eastern checks that were sent out by the Stack-Gibbs Lumber Company had on a certain day reached either of these banks would not change their books in any respect. These obligations in the form of checks were for immediate payment nor do we understand why counsel by showing by the bankers that the overdrawing checks had not yet arrived, should dispute the books of the bankrupt that there was an overdraft when if each of the checks had been presented in the usual course there would not have been sufficient money to have paid them. We do not deem an answer necessary to this lengthy discussion.

The explanation, however, of the two notes to which we have referred, the $10,000 and $5000

notes is unique to say the least. On January 25, 1916, Mr. Coman left Spokane for Minneapolis.

With reference to the portion of the brief that treats in explanation of the transaction that we have outlined at length over the issuance of credit on the $15,000 notes, counsel says in answer, that we "stirred up some dust" in relation to these notes and seem to content themselves with that very lucid explanation of this apparently absolute fraud. Mr. Coman admitted that practically all of the indebtedness of the Stack-Gibbs Lumber Company was made up by the officers of the company signing the obligation and the company endorsing the same, the credit going to the corporation bankrupt. Let us see then what explanation of this record statement of the transaction from the lips of Mr. Coman is advanced by the appellees in their answer brief.

> "On December 30, 1915, C. D. Gibbs, as maker, gave a note for $5000, which was also endorsed by Stack-Gibbs Lumber Company. A certificate of deposit for that amount was issued but retained by the bank because that note was to be secured by an acceptance on a lumber company in Denver. The security never came, and on January 25, 1916, before Mr. Coman started for Minneapolis, that certificate of deposit and that note were cancelled. The bankrupt never got any credit on any book of the bank for said $5000 and neither the bankrupt or Gibbs ever used the same." (Appellees' Brief, p. 67.)
>
> "As to the ten thousand-dollar note on December 30, 1915, such a note signed by C. D. Gibbs and signed or endorsed by Stack-Gibbs

> Lumber Company was made out. The amount of that note was credited in the Stack-Gibbs Lumber Company account No. 2 which was a balance account." (Appellees' Brief, p. 67.)

Counsel for appellee says that Mr. Coman told the creditors in Minneapolis about this transaction. This statement is absolutely untrue. Did the creditors know or have suspicion that a bank representing itself as a national institution would accept interest on a loan that was never made, from an insolvent creditor? Would the creditors for a second have considered entrusting their affairs to a financial institution that would stoop to work of this character? No wonder counsel content themselves with dropping this transaction with this meager explanation.

In the following argument which is supported by neither record nor fact is full of expressions such as "Mr. Katz got enthusiastic on behalf of his Chicago friends" and similar statements which we submit are out of place outside of the pettiest justice of the peace court. Mr. Katz is criticised because he testified to a charge upon the books of the company showing that on February 1st, the company owed the Exchange National Bank the $15,000 that Mr. Coman admitted existed as a charge. It will be remembered that Mr. Katz could not have made this entry; but on the other hand were he made a statement of the liabilities of the concern from even the bank's records this charge would have to have entered into the statement. Counsel state that we on cross-examination, did not go into

the question of overdraft with Mr. Coman but they advanced no reason why Mr. Coman did not explain it. Suffice to say that the court and the judges thereof remembering their experiences when trial lawyers, that if an adverse witness has been forced to admit things to his detriment that there is a limit to what his ingenuity can not overcome. Here was the president of a national bank speaking as an officer of that institution and it was his place when on the stand to have disclosed every record in relation to the transaction had by the bankrupt without it having to be drawn out from him piecemeal as we did draw out the revolting, disgusting action of the bank with reference to receiving interest on an obligation paid out of trust funds that was not owed.

Again counsel resents that part of the brief wherein we say that Mr. Gibbs and Mr. Coman had with them the trust deed that was prepared by Mr. Post when they went to Minneapolis. Why Mr. Post should be so sensitive on the question of the authorship of the trust deed we are unaware. Admittedly going outside of the record, we cannot refrain from calling attention to the fact that many believe Mr. Post is the author of the present trust deed. Counsel state that it is self-evident that after the execution of the trust deed the appellants or the Fort Dearborn National Bank sent an auditor to go over the books of the bankrupt. There is not a word or a suggestion in the record to bear out this statement.

NINETY PER CENT.

We have had but a few hours to prepare this reply brief before the time of the hearing and it must be rushed through to preparation and completion. The argument that ninety per cent of the creditors did in fact sign is so frivolous that we do not deem that an answer to it is necessary. They can not first build up a set of figures for one proposition and strike them down for another. The clear weight of the evidence is that ninety per cent did not sign, notwithstanding a frivolous technicality which counsel attempts to support by extracts from "Words and Phrases". But Judge Dietrich has expressly held that 90% never signed.

In re Creech Bros. Lumber Company, 240 Fed. 9, is not decisive of this action. That involved only the right of an assignee for the benefit of creditors to be reimbursed and this court simply restated the law of *Randolph v. Scruggs*, supra.

CONCLUSIONS.

But there are two further valid reasons why neither the bank nor the trust company can predicate any right upon the trust deed or any of its provisions. Counsel for appellees have seen fit in their brief to call particular attention to the incident in writing providing that the trust deed should not be recorded; and also have called particular attention to that portion of the decision of Judge

Dietrich referring to the non-recording of this instrument and to the further fact that everything was done possible to keep it a secret. Under these circumstances the trust deed is absolutely null and void, and neither the trust company nor the bank can predicate any rights of any kind upon it. That this is the law, regardless of any state statute, is clearly set forth in the case of *In re National Boat & Engine Company*, 216 Fed. 208. In this case the mortgage was drawn covering the property of the bankrupt, and by agreement of the parties it was expressly kept off the records. The court in passing upon this question used the following language on pages 212, 213, 214 and 215:

> "The first claim to be considered is that evidenced by $88,000 of the first mortgage bonds of the National Boat & Engine Company secured by the Astor Trust Mortgage.
>
> The bonds and coupons were filed with the proof and made a part of it. The consideration stated for the deposit and transfer of the $88,000, at par value, of bonds, is that the National Boat & Engine Company desired to have Butterfield surrender a certain trust deed, dated January eight, 1909, given by the Racine Boat Manufacturing Company to him, to indemnify him against indorsements upon notes amounting to over $41,000, assumed by the National Boat & Engine Company; that accordingly the National Boat & Engine Company entered into a certain agreement on April 6th with Butterfield to protect him on his indorsement, and deposited with the trustees named eighty-eight of the bonds, of the par value of $1000 each, as security for the fulfillment by the National Boat & Engine Company of its agreement with Butterfield. The surrender of

the trust deed is named in the proof of this claim as the consideration for the deposit of the bonds. Certain other considerations are now relied upon by the claimant; but no other consideration has been brought to the attention of the Court which seems sufficient to sustain the proof. The trustee in bankruptcy contends that the surrender of the trust deed of the Racine Company was no consideration whatever for the deposit of the bonds, because the trust deed was fraudulent in its inception, was voluntarily withheld from record by the consent, and with the connivance of Mr. Butterfield, and that it is void. Butterfield testifies that the vote of the company authorizing the deed was not transcribed, or inscribed in the original record book, and that it was left in loose sheets because it was hoped that the bond issue and preferred stock issue would wipe out the indebtedness, so that it would not be necessary to have any trust deed, and that in case the stock issue was enough to take care of the indebtedness, there would be no need of having any writing made in the books of the company relating to any trust deed.

With regard to the recording of the deed, the following testimony of Mr. Butterfield is before me:

'Q. Mr. Butterfield, was that mortgage deed covering all the real estate and properties and business of this Racine Boat Manufacturing Company ever recorded?

A. No, sir.

Q. Why not?

A. It was given with that understanding it was not to be recorded except any loss resulted —if I thought the company was on their last legs or about to fail—and then I was to use my own discretion whether to record it then or not.

Q. And why wasn't it recorded?

A. We thought by recording it, it would affect the credit of the company.

Q. In what way, how?

A. It would become publicly known, the conditions set forth in that trust deed, which would naturally affect the credit of the company.

Q. Publicly known to the creditors of the company?

A. Creditors and bondholders.

Q. And you say this was the understanding—the understanding with whom?

A. With Mr. Reynolds and the officers of the company, with myself and others interested, Mr. Reynolds, Mr. Ross and Mr. McCracken. * * *

Q. So pursuant to that understanding it was intentionally not recorded?

A. Yes. * * *

Q. And what was done in not recording was done with the knowledge of all the other directors of the Racine Boat Manufacturing Company?

A. Yes, sir.'

It appears, then, from Butterfield's testimony that the mortgage deed was intentionally kept from record; that this was done by agreement between him and certain other directors of the company; that it was done simply because, if publicly known to the creditors and bondholders, it would affect the credit of the company; that if it was found the company was 'on its last legs and was about to fail', he was then to use his own discretion whether to record the deed or not; that before any option had been obtained upon the properties of the Racine Boat Manufacturing Company, the plan of substituting bonds for the trust deed was talked over between himself and other directors: that it was agreed that no mention should be made in the trust deed of the option; that the trust deed was to be exchanged for bonds to

be held in escrow to cover the contingent liability for indorsements upon notes of the company; that he allowed the negotiations to go on with that understanding; that the prospectus issued by the promoters of the consolidation of the Racine and other companies with the National Boat & Engine Company contained no reference to the Racine Company trust deed. It appears, also, that neither the deed nor bill of sale by which the property of the Racine Company was transferred to the National Boat & Engine Company contained any reference to the trust deed, and that the deed of the real estate from the Racine to the National was a warranty deed of the property free from all incumbrances.

It is the doctrine of the Supreme Court that where, by collusion of the mortgagor, the mortgagee holds a mortgage from record for the purpose of giving the mortgagor a fictitious credit, and including others to give him credit, and the mortgagor fails and is unable to pay the debts thus contracted, the mortgage is fraudulent at common law. Blennerhasset v. Sherman, 105 U. S. 100, 26 L. Ed. 1080. Such a mortgage is held void at common law, whether the motive of the mortgagee be gain to himself, or advantage to the mortgagor. It is held that such a mortgage will not be made valid by the fact that it is supported by a sufficient consideration, and that a deed, not at first fraudulent, may afterwards become so by being concealed, or by not being produced, if thereby the creditors are induced to loan money. Hungerford v. Earl, 2 Vern. 261; Clayton v. Exchange Bank, 121 Fed. 630, 634, 57 C. C. A. 656; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Blennerhasset v. Sherman, supra, 105 U. S. 100, 26 L. Ed. 1080. In Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235, the Supreme Court held that the evidence did not

justify the assertion that there was any agreement that the bill of sale should not be recorded, or that possession should not be taken under it. Whenever such agreement is shown, the Supreme Court has held it sufficient to render a deed void at common law. In the Perkins case (D. C.), 155 Fed. 237, this court held from the facts disclosed that the non-recording of a 'conditional sales contract' was not a mere matter of omission, but was in pursuance of a distinct plan that there should be no record; and the court held the sale invalid. In the Shaw Case (D. C.), 146 Fed. 273, this court held a mortgage void for the reason that it was fraudulently withheld from record; there being a distinct and affirmative understanding that the mortgage was not to be recorded. Certain statutes and decisions of Michigan are cited by claimants, and it is true that local laws are controlling in many transactions in bankruptcy. Taney v. Penn. Bank, 232 U. S. 174, 180, 34 Sup. Ct. 288, 58 L. Ed. 558; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. St. 567, 49 L. Ed. 956. But no Michigan law is brought to my attention in this case which overrides or varies the plain provisions of the Bankruptcy Law.

In Fourth Nat. Bank v. Willingham, 213 Fed. 219, just decided by the Circuit Court of Appeals of the Fifth Circuit, the court sustained the contention of the trustee in bankruptcy that a certain mortgage was 'withheld from record to bolster the credit of the mortgagor', and held that the mortgage was fraudulent and void because of the agreement between the parties that it should be withheld from record for such purpose. The court affirmed the decision of the court below on the authority of Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656, and of the Duggan Case, 183 Fed. 405, 106 C. C. A. 51 In both the cases last cited, the agreements to withhold the mortgage from record was only a tacit agreement.

In the case at bar, this agreement was distinct, open and unquestioned. It is brought before the court by the testimony of the claimant. The case shows an intentional non-recording of the trust deed for the distinct purpose of avoiding publicity, and to avoid injury to the credit of the company. The deed of the Racine Company to the National Company contained a warranty against all incumbrances, and made no mention of the existence of the Racine mortgage. The whole testimony shows a secret scheme and conspiracy to substitute bonds for the trust deed; that the conspiracy was entered into between the claimant, Butterfield, and certain other directors, with the evident purpose of concealing its existence from other members of the board of directors of the National Boat & Engine Company. I am forced to the conclusion that the trust deed of the Racine Company was fraudulent and void, and forms no basis for a valid transfer of the $80,000 par value of the bonds. The learned counsel for claimant contends that, outside the surrender of the trust deed, there was other consideration for the deposit of the $88,000 of bonds. He urges that there was an agreement by the claimant to renew his indorsements, and that there were other considerations. I find that under the circumstances of the case there was no other good and sufficient consideration for the transfer of the bonds, which would make such transfer valid as against the trustee in bankruptcy. And I further find that the transfer of the $88,000 of bonds was invalid as against said trust deed, for the reason that the same was a preference voidable by the trustee, both under the general principles of equity and the express provisions of section 60b of the Bankruptcy Act, as amended."

Under this authority the trust deed is an absolute nullity; and neither the trust company nor the bank

can use it for the purpose of enforcing any rights or remedies whatsoever.

The mere fact that not only the Exchange National Bank of Spokane but the appellants were parties to this agreement cannot assist the bank and trust company in the premises, because where an instrument of this character is void the court will leave the parties exactly where they place themselves. Even though the party raising the question may be in the wrong, still the court will not assist any of the parties to predicate any claim upon such a void instrument. But *when the situation exists as disclosed by the evidence, namely, that Coman the leading officer of both the bank and the trust company misrepresented the entire situation to the other creditors, and thereby induced them to enter into this contract, the other creditors, including the appellant, have a perfect right to insist upon the rule being enforced, namely, that this instrument is absolutely null and void.*

There is also the further answer to this proposition, namely, that this instrument does not constitute an equitable assignment as contended for by counsel for the appellee.

A case where the equities were exceedingly strong in favor of the party claiming the equitable assignment, was decided by Mr. Justice Swayne in the case of *Christmas v. Russell's Executors*, 20 Law Ed. p. 762. In this case a surety attempted to be subrogated. Every rule of equity and justice should have favored such an assignment where the surety is

called upon to pay the debt of its principal. There is also an express promise in this case that the surety should be paid out of this particular fund or property. The court in passing upon the question used the following language:

> "The evidence relied upon to suport the alleged lien, consists, so far as it is necessary to consider it, of letters from Richard Christmas to Yerger, written before Richard transferred to H. H. Christmas the notes originally given to Richard by Lyons. In a letter of the 25th of October, 1865, Richard said: 'I feel great uneasiness about your ability on the bond in suit of Russell against me. I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York, endeavoring to sell it with the mortgage, to pay this debt; I expect to hear from it daily. If not sold I will send it to you as soon as I return.' On the 14th of February, 1866, he wrote: 'I could not safely send you the Lyons note by mail as it is payable to me or bearer—hence if lost it might put me to much trouble'. On the 21st of the same month he said: 'You may rest assured I will protect you with the Lyons note.' In the next letter, of the 12th of May following, he announces the transfer of the notes to H. H. Christmas and said: 'In this I hope I have not lost sight of my purpose to protect you.' These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger.
>
> An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to

> transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal, to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice. Rogers v. Hosack, 18 Wend. 334; Hoyt v. Story, 3 Barb. 263; Dickenson v. Phillips, 1 Barb. 461; Clayton v. Fawcet, 2 Leigh 19; Hopkins v. Beebe, 26 Pa. St. 85; Hall v. Jackson, 20 Pick. 194. A bill of exchange or check is not an equitable assignment *pro tanto* of the fund of the drawer in the hands of the drawee. Cowperthwaite v. Sheffield, 3 N. Y. 243."

Counsel for appellee asked what interest would the Exchange Bank have in advancing the $100,000. When the facts are brought to the attention of the court the answer is self-evident. The Exchange National Bank of Spokane prior to January 1st, 1916, held a $100,000 mortgage on the plant of the mill company. This mortgage is signed by both the mill and the lumber company. There has never been any question but what the security was wholly inadequate. Prior to the Minneapolis meeting the record shows that Mr. Gibbs had a conversation with Mr. Coman in respect to the financial condition of his company, and Coman sent a representative up to Coeur d' Alene to make an examination of the affairs of the company. On January 5th the Exchange National Bank had the mill company pay it $10,000 on account of its principal and interest

on this mortgage, leaving approximately $92,500 still due. In addition there is the $21,000 due the Exchange Bank about which there can be no dispute. Mr. Coman first denied that any such item existed, and then when confronted with the evidence was forced to admit that it did exist but claimed that it had all been settled up. Then when confronted with this letter admitted that he had collected the interest, and then finally at the close of the hearing the original notes themselves were finally discovered and *showed the original bank stamp paid the day before Katz arrived at Spokane.* But this is not all. It appears that Mr. Post prepared a deed of trust, whether *in form as that one,* signed or not, it does not appear, but it does appear that he corrected it upon the day of its return to Spokane so as to suit his desires, and that he prepared all of the minutes and the records for the corporation to pass and attended the meeting and appeared to have represented the lumber company and the mill company, and the bank in all of the transactions. In the deed of trust which was signed not only was the bank to retain its lien upon the property under the original mortgage, which it held, $92,500, but it should also participate, with all of the other creditors upon any funds or moneys derived from the proposition, thereby giving to the bank the same right as a general creditor that everyone else had, and in addition retaining its security.

Counsel for appellee lay considerable stress upon a letter written by Coman to Mr. Aaron on the

ninth day of February, 1916, and say that Mr. Aaron did not make any protest against the paying out of this money, and therefore the question of its payment was waived. It is interesting to see exactly what occurred. The trust deed provides: (a) that this agreement shall not become effective until 90% of all of the creditors have signed; (b) that it shall not become effective until it has been properly ratified and executed by the lumber company and the mill company, and the extension of the mortgage held by the Exchange Bank shall have been made; (c) that it shall not become effective until Katz shall have been elected treasurer, secretary, and director of the company. Admitting that everything that Mr. Post has stated with respect to Mr. Katz is correct, that he represented the eastern parties, the fact that the contract provided that he should be elected treasurer, and that the contract should not become effective until he was elected treasurer, the provision must have been for some purpose, namely, that no money should be paid out until Katz should be on the job. Now, what occurs? On February 9th, 1916, Mr. Coman writes (he does not wire) to Mr. Aaron, and says that they need some money for the current payroll. This letter could not possibly reach Chicago before the 12th day of February by the fastest mail. On the 15th Mr. Aaron replies to the letter and says that Mr. Katz left on the 13th for Spokane. *Does Mr. Coman wait for any reply from Mr. Aaron? Not at all.* On February 9th he discounts for it

eight notes amounting to $40,000, and the money is not all used for payroll purposes. Part of it went to the Dryad Lumber Company; and the records show that over three thousand of it was used to pay interest. Part of it was used to retain a balance in the Exchange National Bank. Part of it was used to pay a man named Thornton, a logging contractor. $7000 was used to pay the Milwaukee Railroad freight claim. Two principal items which are very interesting, namely, $3700 was used to pay the Bardwell-Robinson Company, and $9500 to pay the Lambert Lumber Company for cash which these two concerns had advanced the lumber company. The excuse being that they were friends of Gibbs, and that he wanted to see them get their money back. $12,000 was used to pay bank overdrafts. (Record page 151.) And the only bank that had any overdraft was the Exchange National Bank of Spokane and the Exchange Bank of Coeur d'Alene.

And if we believe what counsel for appellee say that there was no overdraft at Coeur d'Alene, then the overdraft must have all been at the Exchange Bank of Spokane. There was no overdraft at the Fort Dearborn National Bank, because there was no checking account being carried there. But this is not all. On the 16th day of February, $20,000 more is discounted, and paid out in a similar manner.

There is another interesting topic raised by counsel Post. Counsel Post contends that the business was carried on in pursuance of the deed of trust

and that everyone knew that it was so being conducted. There are several answers to this proposition, and we will make them as short as possible.

(a) Katz was never allowed to write a letter back to Chicago, or to any of the other creditors without having it first censored by Mr. Coman; and they were in a majority of instances written in Mr. Coman's office.

(b) That the court will recall that the trust deed was not executed by the mill or lumber company until the 18th day of February, 1916, and was not accepted by the trust company and executed by it until about the 29th day of February, 1916.,

There is no pretense that any possession was taken, nor could there have been any possession taken until the contract was duly executed.

The followed moneys were advanced by the Exchange National Bank prior to the agreement being executed and prior to Katz having anything to do with the proposition, namely, February 9th, $40,000; February 16th, $20,000; and prior to the execution of the agreement by the trust company there was $5000 on February 24th and $5000 on February 26th, making a total of $70,000. So that there has been $70,000 loaned the company prior to any contract of any kind being consummated. But this is not all. B, article IV of this contract provides as follows:

> "The trust company *shall* collect such debts owing to the lumber company and the mill company as are collectible", etc.

The court will see that this provision of the contract is not contingent upon the whim or desire of the trust company, but is an absolute obligation to do something. *The trust company never collected any debts of any kind.* Article X which is relied upon by counsel we perceive, is as follows:

> "The trust deed shall advance such sums of money as it shall deem necessary to meet the present payroll of the lumber company and the mill company and to discharge the claims of the creditors who do not execute this agreement as it may be necessary or requisite to protect the trust estate, not to receive, however, the sum of $100,000; and the trustee shall have a first and prior claim upon said trust estate for the amount of such advancement."

Article X only authorizes the trust company to advance money for two specific purposes, namely, to meet the payroll and to discharge the claim of creditors who do not execute this instrument. It was therefore incumbent upon the trust company and the bank to show what funds they advanced for the purpose as outlined by this portion of the contract. They did not have and they could not have any claim for preference of any funds used for any other purpose than for payroll and for the claims of creditors who did not execute this instrument. It must be apparent to anyone who reads this record that the record wholly fails to point out exactly what all of this fund was advanced for. It does appear that a large portion of it was not advanced for the purpose of meeting the payroll and the demands of creditors who had not signed the agreement. It

must further be apparent that if Mr. Coman was so fitfully ignorant as counsel would pretend he was, that it did not occur to him that when it was necessary to pay out $70,000 before Mr. Katz could arrive upon the scene, there must have been something radically wrong with the affairs of this lumber company. 10% of the signing creditors is $63,900; now when you have to pay out $70,000 before the document is executed by the lumber company even Coman should have become alarmed. But the answer to the proposition is very clear, namely, out of the advancement made, Coman had already repaid himself. He could work down his mortgage so that the security could pay out the balance due. If he could run this property long enough to get himself in the clear, it did not make much difference to him what happened to the other creditors. There was no objection on Coman's part to allowing them to sleep peacefully on, ignorant of the true situation; *and it cannot be denied that these creditors, who are thousands of miles away, must have been relying upon Mr. Coman and his representations.*

Another reason advanced by counsel for the paying out of this $70,000, is that Mr. Coman had orally arranged with Mr. Gibbs that money might be paid out before the contract was signed. Counsel must indeed be in sore straights if he is relying upon the alleged oral agreement between Gibbs and Coman made in Minneapolis, whereby Coman pays out the money and thus jeopardizes the rights of the creditors of the estate. And regardless of whether such

an arrangement could or could not be made, suffices to say that under the terms of the contract no such arrangement would be good because the contract did not become operative until ninety per cent of the creditors had signed and Katz had become treasurer. Even Mr. Post was forced to admit that this so-called arrangement with Mr. Gibbs is of no force or effect. (Page 223 of the Record.)

> "Mr. Post. Now, Mr. Coman, I see in this letter you state that it will be necessary to make some advances in anticipation of the arrival of the contract; tell the court whether or not Mr. Gibbs in Minneapolis orally concurred and agreed to that contract?
>
> Mr. Adams. I object to that.
>
> The Referee. On what ground?
>
> Mr. Adams. Mr. Gibbs couldn't orally agree to a contract of this character, could he?
>
> Mr. Post. He couldn't bind a corporation to do it of course. (198)
>
> Mr. Adams. It is up to the contract to be executed in due form as the contract provides.
>
> Mr. Post. I do not contend it binds the corporation but it shows the attitude not only of Mr. Coman but also of Mr. Aaron and the other gentlemen who were in relation to it.
>
> The Referee. The objection overruled, the answer may be taken for what it appears to be legally worth.
>
> A. Yes, that is what he went down there for."

Mr. Post was thoroughly familiar with the terms of this contract because he prepared an amendment to it, and he must have known that the contract could not have become operative until the conditions precedent named in the contract had

been complied with. Mr. Post takes exception to our statement that Gibbs with Coman submitted a statement of the assets and liabilities, which was false, at the Minneapolis meeting. According to the testimony of Mr. Coman, Mr. Gibbs submitted to the creditors at Minneapolis a statement of the assets and liabilities. On that statement, according to Coman's testimony, the Exchange Bank figured on the basis of $6,000. At least to the amount due to the Exchange Bank he knew that statement was false, but Coman continues to misrepresent the situation. J. K. Stack, one of the largest creditors, holding a claim of $100,000, was not at the meeting or represented; but Coman writes back as follows:

> "This arrangement has been the result of a conference of the different creditors of Mr. Gibb's concern, representing more than ninety per cent of the indebtedness."

This is an absolutely false statement. J. K. Stack, Mrs. Tolerton and Mrs. Gibbs were not represented at the meeting, and their total claims amounted to $143,000. There was not ninety per cent of the creditors at the meeting, and it required more than the signature of Mrs. Tolerton at the meeting to make the ninety per cent. It required the signature of Stack, Tolerton and Gibbs and in the neighborhood of $50,000 more to make ninety per cent of the creditors, which $50,000 never was secured.

There can be no doubt but that from a reading of this evidence that the whole scheme was to trustee this property to the Mechanics Bank, so as

to work out the plan agreed to between Coman and Gibbs in Spokane long before the Minneapolis meeting of creditors was ever called by Coman.

The record also shows that when Mr. Katz arrived in Spokane he immediately reported to Mr. Coman. (Record page 195.)

> "Mr. Coman told me that Mr. Gibbs was a very able man, that he was especially a great lumber salesman and I should try to get along with him tactfully. The whole tone of the conversation and subsequent conversations was to get the confidence of the people and get their friendship."

And the further record (page 200):

> "Mr. Coman did not tell me anything about taking possession and notifying the people that I was in possession. I was told to take good care that nobody else would find out about it, this trustee agreement was to be kept absolutely strictly secret before anybody else; I remember at one time the representative of Dun's or Bradstreet's found it out and one time when I was in Spokane called me up at the Exchange Bank and told me to come over and had a talk with me and I was suspicious of that talk and asked Mr. Coman about it, what I should tell him, and Mr. Coman gave me the advice to say that we do not expect to ask for additional credit and to refuse all information, which I did (154). We had several conversations, that is, Mr. Coman and I, of this character. I couldn't remember all, but we had a few conversations about that topic."

The first information that the appellant or anyone outside of Coman and his bank and Gibbs ever knew about the $15,000 loan, was when the hearing

of this case was being had before Referee Lewis. Even the witness Katz knew nothing about it until that time.

At this time the petition of the Exchange Bank had not been filed. Katz asked what the $60,000 had been paid out for and was shown the letter which had been written setting forth the figures which appear on page 151 of the record. When we came to examine the books we found it in the account of the Exchange National Bank, and discovered that their account instead of being $6,000 it was $21,000; and the following occurred before the Referee, record, page 195:

> "Q. You find an item on the 15th of $15,000 credited to the Exchange National Bank; when was your attention first drawn to that item?
>
> A. Practically this morning when I looked through the books; I saw at a glance when I talked to you on Saturday——
>
> Q. Who do you refer to by you?
>
> A. Mr. Post, and we talked about that something must be wrong and I looked over it and that item of $15,000; when I read those figures out of the books I wasn't asked about it and I didn't mention it.
>
> Q. Was that a part of your first $40,000 paid out of those notes that we discounted?
>
> A. It must have been."

Mr. Post and Mr. Coman immediately denied that any such thing ever existed. We have abundantly

pointed out where Mr. Coman falsified and stultified himself in this respect.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

I. F. SEARLE, MINNIE A. GIBBS and MERRILL, COX & COMPANY, Creditors of the Estate of Stack-Gibbs Lumber Company, Bankrupt,
Appellants,

vs.

MECHANICS LOAN & TRUST COMPANY and THE EXCHANGE NATIONAL BANK OF SPOKANE, Creditors of Stack-Gibbs Lumber Company, Bankrupt,
Appellees.

No. 3110

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, BANKRUPT.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Appellees' Reply Brief

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No.-------

IN THE MATTER OF STACK-GIBBS LUMBER COMPANY, BANKRUPT.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Appellees' Reply Brief

Because of the change of position in Appellants' Reply Brief, the citation of a few additional authorities and the many misstatements of fact, we feel constrained to briefly reply thereto.

While there are many other misstatements of fact, we will refer to those appearing on pages 2, 3, 4, 5, 20, 26, 29, 30, 31, 32, 35, 36, 46, 47, 49, 50, 51 and 52 of their brief.

JURISDICTION.

Appellants cite as an additional authority the decision of the Supreme Court of Arkansas in 174 S. W., page 549. This is a suit brought in the state court for a judgment upon an order allowing the claim of the plaintiff in the bankruptcy court, on the theory that this order is tantamount to a judgment, and that while the original claim would be barred by the statute of limitations, this "judgment" is not so barred under the state statute. In other words, it purports to be a suit upon a judgment, and the contention is that the order allowing the claim is a judgment within the meaning of the statute of limitations applying to judgments. The court held (a) that the bankruptcy court did not in fact enter any judgment, and (b) that it had no power to enter such a judgment. Further comment on this case is of course unnecessary.

The language of this reply brief suggests that we did not clearly express our thought as to the nature of this proceeding. Evidently the District Court, as well as the Referee, did not misunderstand us. The expression in our brief of "equitable assignment" may not be the best way of stating the point. Our claim as asserted in the written claim and as understood by the Referee and the District Court is that the appellees or the trust company are entitled to a preference claim or lien for the whole amount claimed upon the entire estate of the bankrupt or funds representing said estate in the hands of the trustees, and that the same constitutes a first lien thereon, and in any event, that if

anyone has a prior right thereto, such persons are only the cerditors who did not sign the trust deed, and that none of the creditors who did sign the trust deed have any such prior right but that their rights are subsequent.

The procedure or machinery by which payments are to be made by the trustees to the various claimants is by way of "dividends." To illustrate: If the funds in the hands of the trustee, after the disposition of all of the property and payment of the expenses of the trust, should be $100,000 and our claim is $100,000, and if those not signing the trust deed constitute, say, 5% in amount of the claims of the creditors, and those signing the trust deed constitute, say, 95% thereof, then the appellees would get $100,000 (if their claim should be allowed as against the entire estate prior to all other claims) or would get $95,000 (in case the non-consenting creditors are allowed prior rights), and this would be worked out as a matter of procedure by way of dividends,—that is to say, as dividends are declared by the trustee. He would in one event pay all of the money to the appellees until their claim is paid in full; in the other event the dividends which would otherwise go to the signing creditors would be paid to the appellees. This is all expressly provided for by the trust deed in the paragraphs cited in our opening brief, pages 30 to 33. Paragraph 10 provides for a first and preference claim upon the entire trust estate. Paragraph 11 provides that the same "shall be paid from the proceeds of the trust estate in preference to any other claims

thereupon." Paragraph 18 provides that the trust estate shall not be distributed to the creditors until after the trustee has been repaid for advancements and expenses. Paragraph 19 provides that the advancements, expenses and compensation "shall constitute a charge upon the trust estate superior to the indebtedness of any party secured hereby."

APPELLANTS' NEW POINTS.

After concluding their discussion of "Jurisdiction" and at page 44 of Reply Brief the statement is made: "This instrument does not constitute an equitable assignment as contended for by counsel." No reason is given for that new contention. There is no argument on the subject. But counsel cite a case clearly not in point under the facts, to-wit, Christmas v. Russell, 14 Wallace 69.

We did not anticipate the raising of this question, as it was never raised before, and as under the language of the trust deed and elementary principles it seemed to us too clear for discussion. However, as the point has been raised, we will cite a few authorities illustrative of the principle.

In order to do justice and carry out the intent of the parties a court will under some circumstances hold that even a bank check constitutes an equitable assignment. Fourth Street Bank v. Yardley, 165 U. S. 634, 643.

In Walker v. Brown, 165 U. S. 654, 664, paragraph

1235, Vol. III, Pomeroy's Equity Jurisprudence, is quoted with approval as follows:

> "The doctrine may be stated in its most general form that every express executory agreement in writing whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers, with notice * * * . The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, 'Equity regards as done that which ought to be done.'"

In that case the holder of certain bonds had given to a certain creditor a letter set forth in the opinion at page 663.

Barnes v. Alexander, 232 U. S. 117, is interesting in that (a) it disapproves of the Christmas case cited by appellants, and (b) the doctrine established is set forth in the head note:

> "An obligation to pay, but definitely limited to payment out of a fund, creates a lien. There should be but one rule in this respect, and that is the one suggested by plain good sense. Where parties have a lien on a fund, they can follow it as soon as identified into the hands of others than the person originally receiving it."

In The Elm Bank, 72 Fed. 610, Judge Morrow quotes from the Christmas case a paragraph not contained in the quotation in appellants' reply brief, namely:

> "An order to pay out of a specific fund has always been held to be a valid assignment in equity and to fulfill all of the requirements of the law."

The Christmas case is cited by Judge Brewer in Schuler v. Laclede Bank, 27 Fed. 424. In this case the court holds that while a check does not ordinarily operate as an equitable assignment, nevertheless, if the drawer of the check becomes insolvent and makes a general assignment before the check is presented, then the check will operate as an equitable assignment of the amount drawn for as against the general assignee.

In Wilder v. Watts, 138 Fed. 426, the first head note is:

> "Where an alleged bankrupt, before insolvency, arranged to borrow money to purchase goods under an agreement that he would have the goods insured and assign the policies to the lenders as collateral security, and loans were made to him, the agreement operated as a valid equitable assignment of the policies, though they were not delivered when issued nor actually assigned until after loss, when the borrower was insolvent."

The Supreme Court of Alabama, in Carroll v. Kelly, 20 So. 456, citing the Christmas case, holds as set forth in the head notes as follows:

> "An agreement whereby C, a legatee, purchases the interest of K, another legatee, and agrees that the executor shall hold his interest in the

estate as security for the payment of the consideration, and that the executor shall pay the same to K before paying to C any sum due him under the will, creates an equitable lien on the personal property under the will, but not on the real property or its proceeds to which C may be entitled under the will, but not on the real estate. On a bill to enforce such lien, the executor is a proper party."

Other illustrative state cases are:

Union Ins. Co. v. Glover, 9 Fed. 529;
James v. Newton, 8 N. E. 122 (Mass.);
Young v. Jones, 54 N. E. 235 (Ill.);
Seattle v. Liverman, 9 Wash. 276.

The Christmas case is cited in all the foregoing.

In appellants' reply brief, under the heading, "Conclusions," at page 38, they suggest another new point neither suggested in their original brief nor in their objections (Rec., p. 18) nor in their petition for review (Rec., p. 69), nor elsewhere in the record. That point seems to be that the trust deed is null and void because it was not promptly recorded and no publicity was given thereto. The good faith of the signing creditors and the trust company in making this trust deed is beyond controversy. They were not seeking to do any injury to any other creditor, present or future. Apparently the supposition was that the money advanced would be sufficient to take care of the pressing debts, exclusive of those represented by the signing creditors, and that the business could be run, if run at all, without the incurring of any new obligations. There was no intent to defraud anyone. The belief was that the assets would pay all liabilities.

There is no evidence that anyone was put in any worse position than he would have been in had this instrument not been executed.

This new position of the signing creditors may be stated thus:

> "We, creditors representing ninety per cent of the debts of this lumber company, believed that the assets exceeded the liabilities and all the creditors would be paid in full, provided the lumber company could get advancements to the amount of $100,000. We arranged with the trust company to make these advancements, and to protect the trust company we agreed that it should receive back its moneys advanced out of the trust property before any moneys were paid to us on account of our claims. We in effect assigned our claims and all our rights to the trust company to secure these advancements. To protect ourselves we selected the man to run the business under this contract. We thought that knowledge of this contract would affect the selling price of the lumber in the yard and to be manufactured and we advised the trust company not to put this contract of record. Now things have not turned out quite as well as we anticipated, and we assert in a court of conscience that the trust company cannot enforce our contract against us because the trust company obeyed our instructions."

While the distinction between "void" and "voidable" is well recognized, we sometimes find the word "void" used in the sense of voidable. An assignment for the benefit of creditors made with the intent to defraud creditors is not strictly void. It is good as between the parties but it is subject to being avoided by creditors

affected thereby so far as their interests are concerned. Of course such an instrument consented to and executed by certain creditors, while it may be avoided as to the non-consenting creditors, cannot be avoided as to the consenting creditors.

Whatever may be the rule in some jurisdictions about the necessity of recording an instrument in order to give it validity, the question is settled by statute in the State of Idaho. Section 3163, Vol. I, Idaho Revised Codes, is:

> "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

This court held under a similar statute in California that the failure to record a mortgage given by a bankrupt until after the bankruptcy proceedings were commenced did not affect the validity of the mortgage. (In re McIntosh, 150 Fed. 546.)

The question now before us is not whether the trust company has a lien under this instrument upon the entire trust property to the detriment of the creditors who had no knowledge of the instrument, but whether it can be attacked by those who agreed to it and signed it.

Now this instrument purports to do two things: (a) create a lien upon the entire trust estate for the money advanced; (b) create a lien upon or assignment of the claims and interests of ninety per cent of the creditors for the repayment of the same money. If, perchance, the validity of this instrument as to lien "a"

is affected by the non-recording thereof so far as the non-consenting creditors are concerned, which non-recording is at the suggestion of the signing creditors, manifestly the instrument is not affected as to the same signing creditors so far as either lien "a" or "b" is concerned.

It may very well be that this idea was in the mind of the attorney for the signing creditors, Mr. H. J. Aaron, when he drew this instrument. He may have thought there might possibly arise a controversy over the lien of the trust company as against the entire fund because of his plan to keep the instrument from record, and that the trust company who was advancing the money at the instance of the signing creditors was entitled to every possible protection, and therefore the somewhat peculiar language of the different sections cited above, which provides for a lien as against and prior to the signing creditors.

In In re Mariner, 220 Fed. 542, is clearly stated the point that mere failure to record a chattel mortgage does not avoid the mortgage, *but there must be coupled with it an intent to defraud* by giving the mortgagor a fictitious credit. It is conceded that there was no such intent in the instant case.

To the same effect, see In re Moser, 224 Fed. 738, 751.

That a chattel mortgage withheld from record is fraudulent and voidable *only as to those extending credit on the faith of the grantor's apparent ownership*

free from this encumbrance, is well settled and the point has been decided by this court. Manders v. Wilson, 235 Fed. 878.

Manifestly the question first raised in the reply brief in such an offhand manner under the heading "Conclusions" is not only without merit as an abstract proposition but is one in which these appellants have no interest and cannot urge as a reason for their attempted repudiation of their contract.

MISSTATEMENTS OF FACT.

We omit so far as possible all matters referred to in our original brief.

The statement on page 3 that Mr. Coman *caused* his attorney to prepare a trust deed along the lines of the trust that was afterward consummated is incorrect.

On the same page appears the statement that the bank was the owner of bonds of the Dryad Company, "a subsidiary corporation of the bankrupt," for $100,000. The relationship between the two companies has been stated elsewhere. The amount is $92,500. *The bonds were amply secured by real estate.*

The statement at the top of page 4 that Mr. Coman called a meeting of the eastern creditors is untrue. Mr. Gibbs called the meeting of his creditors and requested Mr. Coman to go east with him. (Rec., p. 215.)

On page 5 it is said that Gibbs was "brought to the

meeting by Mr. Coman, who either by his silence or express representations" acquiesced in Gibbs' statement of facts. Wholly untrue. There is not a scintilla of evidence that Mr. Coman's conduct was other than that of absolute fairness and frankness or that he had any other knowledge than that possessed by the Fort Dearborn National Bank, the First National Bank of Nebraska, these appellants and the other signing creditors. Manifestly all these creditors would not only have introduced some evidence before the Referee, but would also be appellants now if they honestly believed any of the charges set forth in this brief.

In this connection, and before proceeding further with these misstatements of fact, we beg to call attention to a decision of this court in re Dorr, 196 Fed. 292 (in bankruptcy), wherein this court said:

> "Where the testimony is conflicting and the findings of fact of the referee and the district judge are the same, the facts will not be inquired into by an appellate court unless there is plain error."

The Circuit Court of Appeals for the Eighth Circuit in First National Bank v. Abbott, 165 Fed. 852, at 859, expressed the same thought in a bankruptcy case, as follows:

> "When the court and the referee have considered conflicting evidence and have made a finding or decree thereon, it is presumptively right and it may not be reversed unless it clearly appears that they have fallen into some error of law or have committed some serious mistake of fact in reaching their conclusion."

On page 20 appears the statement that Mr. Katz wrote no letters to any creditor except in the office of Mr. Coman, and that most of them were dictated by Mr. Coman. The record shows that Mr. Katz wrote frequent letters to Merrill, Cox & Company, Fort Dearborn National Bank, Exchange National Bank, Mechanics Loan & Trust Company and some other creditors, from his office at Gibbs, Idaho. There is no contention in the record that Mr. Coman ever saw any of these letters until received in due course of mail. Mr. Katz did, however, carry on other correspondence with the appellant, Merrill, Cox & Company, and Mr. Katz testified that he destroyed his copy of these letters. None of these letters was produced by Merrill, Cox & Company, and therefore are not in the record. To explain this peculiar transaction, Katz testified that he showed these letters to Coman before they were mailed. (Rec., p. 173.) Whether he showed *all* of them or not, we do not know, as this appellant did not produce them so that we could examine them and find out.

The statement mentioned above on page 20 is followed by another untrue statement that "everything he (Katz) did while in charge of the plant was under the direct personal supervision of Mr. Coman." This does not square with the statement contained in appellants' original brief at pages 29, 110, 112 and 113, that the trust company paid no attention to the trust and never did anything in relation thereto.

A similar false general tirade, without any evidence whatever to sustain it, is contained on page 26.

One would think on reading page 29 that there were some pages of the books of the Exchange National Bank "pasted together." There is no such evidence. The insinuation is false. The fact is that the Mechanics Loan & Trust Company had a little book called a note register and that the bookkeeper entered in that book all of the notes in question but made an error in one of his original entries and started another page and pasted two leaves together. The book was brought into court, and when some insinuation was made in relation thereto, we requested that the leaves be separated, and that was done and the same were carefully examined by counsel in open court and the whole record put in evidence, but as the exhibit afforded not even an opportunity for an insinuation, the appellants did not have it copied into the record. (Rec., pp. 265-7, 275, 289.)

The statement on pages 28 and 29 that Mr. Coman gave some testimony after he had had ample time to think over the effect thereof and in all probability had gone to his bank and inspected his records, followed by a garbled quotation from the record, is most inexcusable. The testimony on page 236, Record, shows that the next day after Mr. Coman was first on the witness stand he showed in the bank all of the bank's records to appellants' attorneys, and that afternoon he brought the same to the hearing. The *pertinent* matter in his testimony is represented *by stars* in the quotation at page 29 of their brief, except that very pertinent matter follows that quoted in the brief.

On page 30 the figures, $100,000," in the fifth line of the quotation should be $10,000." The quotation stops too suddenly and the matter following it and running into page 238 must be read to understand it.

The statement on page 31 that "it was at this point that Mr. Adams confronted the witness with these letters" is theatrical but untrue. We introduced the letters and read them into the record as a part of Mr. Coman's testimony. (Rec., p. 238.) Mr. Coman had nothing to do with this little item of interest. He said: "In regard to the added interest up to February 12th, I had nothing to do with it personally. I suppose it was handled by the note teller. I do not handle those matters myself." (Rec., p. 255.)

Page 35 of the brief says that the statement in our brief that Mr. Coman told the Minneapolis creditors about the transaction "is absolutely untrue." Mr. Coman so testified (Rec., p. 231), and there is no contradiction thereof.

A new idea is suggested at page 47. It is said that the bank, under the trust deed, would participate in the dividends as the owner of the bonds issued by the Dryad Lumber Company. No such suggestion has been heretofore made in this case. Why made at page 47 of reply brief, we know not. However, the record shows that a reference is made to these bonds in paragraph 20 of the trust deed (Rec., p. 47), also that that paragraph was amended. (Rec., p. 227.) The amendment is not in the printed record, as that paragraph has nothing to do with any issue made by the

appellants or presented either to the Referee or the District Court.

The statements contained on pages 49 and 50 are practically all untrue.

On February 22, 1916, a letter was sent to Merrill, Cox & Company and other creditors showing how the first $60,000 advanced was paid out. (Rec., pp. 150, 151.) *Neither the appellants nor any other creditor ever made any complaint.* The business was carried on for five months thereafter (including the advancement of $40,000 additional money) without any complaint of any kind from these appellants or any other creditors. Furthermore, the trust deed, in paragraph 1 (Rec., p. 40), provides that the trustee may manage the property and "incur all proper *expenses* in connection therewith as in its judgment shall seem to the best interest of all the parties hereto;" and in paragraph 2 thereof provides that the trustee may operate the mills, cut logs, etc., "and in carrying on such business it may incur such *expense* as it thinks necessary;" and in paragraph 3 thereof, that the trustee may employ such persons as it deems necessary for the management of the business "and may pay persons so employed reasonable compensation;" and in paragraph 11, that these *expenses* shall be deemed maintenance charges of the trust estate and shall be paid from the proceeds of the trust estate; and in paragraph 13, that the trustees may pay *interest* accruing upon the interest-bearing claims of the creditors.

On page 49 of the reply brief the charge is made

that the trustee paid $3000 for interest. Suppose it did. It had a right to. But the record shows it was $1000. (Rec., p. 151.)

It is said on the same page that a part of the $60,000 went to Dryad Lumber Company. The record shows that the Dryad Lumber Company ran the mill and the Stack-Gibbs Lumber Company did not have any payroll but the Dryad did, and when pay day came around the Stack-Gibbs Company turned the money over to the Dryad to meet that payroll (Rec., p. 152), and that is the item of $18,200 referred to on page 151.

It is said on page 49 that part of this money went to the Exchange Bank. Looking at the record (page 151), you will see that there was paid out $68,500, of which $60,000 was advanced by the trust company, and the remainder was received from shipments of lumber. Of this item $12,000 was bank overdrafts created in the operation of the business after February 1st, and there were *four* banks where business was done. This is but camouflage on the part of appellants and we have discussed the same in our opening brief at pages 69-70.

It is said that $7000 was paid for freight on logs. True, but if the business was run by the trustee as it had a right to run it, it must haul logs and must pay freight.

It is said that the payment made to Bardwell-Robinson and Lampert Lumber Company was because

Gibbs wanted them to get their money. No citation to the record, of course, because it is not true.

Whether or not a part of the moneys was actually advanced before the trust agreement was actually executed by the corporation bankrupt is, of course, immaterial. None of the moneys were advanced until after the instrument had been signed by all of the creditors who did sign the same, and later the whole transaction was ratified and approved at a meeting of the board of trustees and of the stockholders of the bankrupt on February 18th. Neither the bankrupt nor the signing creditors can contend that it was not advanced on the strength of the trust agreement. No one does so contend, and the correspondence shows the fact. The bankrupt and the signing creditors, having received the benefit of the moneys advanced at their instance and request and upon the strength of their signing this instrument, cannot repudiate the transaction.

The statement on page 50 that Katz was never allowed to write a letter to Chicago without having it censored by Coman is false. There is no such evidence. Appellants do not attempt to cite any. The record is filled with letters written by Katz to creditors, but it appears that Katz maintained a secret correspondence with his particular Chicago friends, Merrill, Cox & Company. He says he showed these letters to Coman. Whether he showed all of them or not, it is impossible to state, as the counsel for Merrill, Cox & Company failed to produce their coresopndence

and stated in open court that he did not have any, which is passing strange.

In their opening brief appellants stated that no debts of any kind were ever collected. No citation to the record. We referred to that in our original brief and cited the record. Appellants reiterate their original statement at page 51 of reply brief, and again, of course, without any citation because the statement is not true.

On page 51 of appellants' reply brief is the wholesale charge that the moneys were not advanced for the specific purpose named in the trust deed. The Referee and the District Court found to the contrary. This charge is not made in appellants' original brief as we pointed out in our original brief, page 62. No citation to the record is now made. It is simply another general misstatement of fact. We do not think we are called upon to discuss this question. The proof is ample. We introduced letter after letter written by Katz stating that he needed money for payroll or some other purpose. We put Katz on the witness stand. He was an adverse witness, but we showed by him how every dollar was spent in accordance with the letter and spirit of the trust deed.

In their opening brief appellants claimed that the Exchange Bank had used some $9000 of this money to pay itself an overdraft. We punctured this falsehood in our original brief. Appellants ignore it in their reply brief but come back on page 52 with a general charge that Coman (meaning the bank) repaid

himself some money, the amount not named, out of these advancements. As usual no citation to the record. Simply another misstatement.

On page 52 they italicize their statement about these creditors thousands of miles away relying upon Mr. Coman. These creditors, and especially this creditor, Merrill, Cox & Company, had a secret correspondence with Mr. Katz, who was selected for the position by themselves through their attorney, Mr. Aaron.

On page 2 of their reply brief it is stated that certain evidence was stricken, and the record is silent as to any attempt to "renew this testimony." Our answer to that is: first, the part referred to was not stricken; what the Referee attempted to strike was the statement about "secured creditors;" second, appellants recognize that it was not stricken in their original brief, page 121; third, the Referee's ruling on the question of evidence is not pertinent; the evidence must under the rules be transcribed and considered by this court. (First Nat'l Bank v. Abbott, 165 Fed. 852, 855.)

Respectfully submitted,

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